Victims and Victimizers: A Study of the Normative Order of Criminal Law

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The theory of criminal law has little place for victims. Yet victims have a place in ordinary moral thought. We make a distinction, morally, between one gangster attacking another and a gangster attacking a bystander (though the assaults might be formally identical), or between selling drugs to an adult and selling them to a child (though the criminal code might treat the two as the same). That is, our intuitions take account of a concept this paper terms “victimization”—the idea that the moral status of a wrongful act turns in part on the degree to which the wrong’s victim is vulnerable or innocent and the wrongdoer preys upon that vulnerability or innocence. In this regard, both in doctrine and in practice, actual criminal law tracks ordinary moral thought more than it does criminal theory. Victimization, this paper argues, is part of the unstated normative logic of the criminal system.

The argument has three parts. Part I sets forth the concept of victimization as an element in normative reason, giving philosophical content to the moral intuition. Part II shows the concept to be implicit in both the doctrine and practice of criminal law—in penal codes, on the one hand, and, empirically, in the decision-making of police and capital juries on the other. Part III asks normatively whether the concept of victimization is something that should have a place in criminal law, arguing that the concept is both essential to the project of retributive justice and also dangerous, prone to patterns of distortion that offend a democratic criminal system’s commitment to equality.

A concluding section reflects methodologically on the paper’s approach to moral philosophy in law—an approach in which the law is not just a tool with which to implement the conclusions of an extralegal philosophical inquiry, but an object of study with a certain immanent moral content already in place, which philosophy can help bring to light and expose to question.
INTRODUCTION

There is a view of criminal justice on which the characteristics of a wrong’s victim should not matter in determining the act’s degree of wrongfulness or the punishment it merits. A murder is a murder, whether the victim is the most vile

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2 The Wire: All Prologue (HBO television broadcast, July 6, 2003). Omar Little is a character in The Wire, a television series about police and criminal culture in Baltimore, who has just testified, when asked his occupation in court: “I rip and run. . . . I robs drug dealers.” The remark quoted above is his apologia—and the television audience’s too, since Omar is a kind of hero in the show—when questioned about that work.
predator or the most innocent child; the norm against killing having been violated, punishment—the very same punishment—must follow. Our commitment to the equality of persons, the thought goes, requires upholding norms in this sort of formal, neutral way, in which the particularities of the agents on either side of the norms don’t matter. And the thought is also that, a criminal act being merely a prohibited act coupled with a prohibited state of mind, a culpable transgression of a “Thou shalt not,” victims’ characteristics are just irrelevant; if an intentional killing is a murderer, it is so regardless of whether the victim is tall or short, male or female, black or white. Thus, as the criminal theorist George Fletcher has remarked with respect to the theory of retributive justice: “You can read a first-rate book like Michael Moore’s recent Placing Blame and not find a single reference to the relevance of victims in imposing liability and punishment.” And thus Michael Moore can respond: “I think victims should and must be ignored if you are claiming to be doing retributive theory.” Of course, Moore added, victims are naturally taken up in the criminal norms themselves; there can’t be a murder unless someone is killed. But he saw no role for them beyond that. That is, he saw no role for them, given a fixed crime, in answering Henry Hart’s famous question: “[W]hat are the ingredients of moral blameworthiness which warrant a judgment of community condemnation?”

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2 Michael Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 BUFF. CRIM. L. REV. 65, 67 (1999). In fairness, Moore’s subject is criminal procedure when he makes this remark. But the implications and sweep of his argument are broader.

3 Supra note 1.
Surely this view—I think it is the dominant view—is partly true. A victim’s race shouldn’t matter if we are committed to equality, nor his social class, nor his religion. And some characteristics are indeed just irrelevant—whether a victim has blonde hair or speaks with a stutter or some such. But is the dominant view really wholly true, that is, true without exception? Is it really true that it shouldn’t matter whether the victim is a child? That seems mistaken. And what if a state’s criminal code says that a victim’s characteristics matter in some way—that murdering a child, for example, is an aggravating factor that shifts ordinary intentional murder to some more serious category (as some do)? Are we then to think that no victim characteristic should matter, unless the code says it does, and then it should? That seems confused. In fact, various provisions of criminal law make some characteristic of the victim essential to the definition or grading of the crime—statutory rape, for example. These would be incoherent if nothing about the victim could matter. Part of the office of criminal theory is to offer justification for our criminal law being the way it is. Our criminal law does respond to victim characteristics in some instances. The dominant view seems incapable of explaining why.

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6 The distinctive feature of the Moore/Fletcher exchange is that Fletcher’s challenge brought Moore’s great assumption, the assumption that victim characteristics don’t figure in the calculus of blame, to the surface—an idea, as Fletcher says, never defended or even expressly asserted in Moore’s nearly nine-hundred page book on the subject of blame, but just passed over in silence, an absence. Moore’s book is in this respect a symbol of the field. Mainstream criminal theory has not traditionally looked upon the position of the victim as the sort of thing that needs to be addressed, and leading casebooks and treatises reproduce the Moorean absence. See, e.g., JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (4th ed. 2007) (leaving the subject of criminal victims out of the table of contents and index and featuring no sustained discussion of victim characteristics); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW (2d ed. 2003) (same); ELLEN PODGOR ET AL., CRIMINAL LAW: CONCEPTS AND PRACTICE (2009) (same); STEPHEN J. SCHULHOFER ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (8th ed. 2007) (same, excepting two passing references in the table of contents); see also infra note 106 and accompanying text. Arguably the Model Penal Code reflects the same oversight. See Markus Dirk Dubber, Policing Possession: The War on Crime and the End of Criminal Law, 91 J. CRIM. L. & CRIMINOLOGY 829, 990 (2001) (“[T]he victim as person plays a subordinated role in the Model Code. . . . The Model Code goes a long way toward shifting the core of criminal law from interpersonal crime—of persons against persons—to apersonal offense—of threats against interests, communities, and ultimately the state . . . .”); George P. Fletcher, From Rethinking to Internationalizing Criminal Law, 39 TULSA L. REV. 979, 994 n.57 (2004) (“Model Penal Code § 1.02(1) expresses a commitment to protect the accused against false convictions and says nothing about the interests of victims.”). What one does find in the literature is a recognition of the sort I’m advocating here—a recognition of the existence of the oversight. See, e.g., ELLEN S. PODGOR ET AL., MASTERING CRIMINAL LAW 20 (2008) (“In the analysis of the criminal law, victims are probably the least discussed group . . . .”); Fletcher, supra note 3, at 51-52 (“Remarkably, the theory of criminal law has developed without paying much attention to the place of victims in the analysis of responsibility or in the rationale for punishment.”). And although in the wake of the victims’ rights movement an increasingly substantial place has been carved out for victims in criminal procedure, “[t]he interesting challenge,” as Fletcher argues, “is to integrate victims into the justification for punishment”—that is, to make a place for them in “the theory of retributive punishment.” Id. Meeting that challenge is precisely this paper’s aim.

7 See, e.g., TEX. PENAL § 19.03(a)(8) (counting the murder of a child under six years old as an aggravating factor that can elevate ordinary murder to capital murder).
Let’s turn now from law to ordinary moral thought—by which I mean nothing grand or mysterious, but just those everyday intuitions of right and wrong, good and bad, sometimes reflective, sometimes not, that most people make just in virtue of being evaluative beings in an evaluative culture. Victims indubitably have a place here. We make a distinction, morally, between one gangster attacking another and a gangster attacking a bystander, though the assaults might be formally identical, or between selling drugs to an adult and selling them to a child, though the criminal code might treat the two as the same (as a matter of fact, some don’t). We think there is something especially objectionable about financially defrauding the elderly. We think there is something horrible, loathsome almost without peer, in raping young children. These are comparative judgments: They in no way excuse or minimize the seriousness of ordinary assault, drug-dealing, fraud, or certainly rape, but they find something still worse about those crimes where the victims are, like bystanders, the elderly, or children, particularly vulnerable or particularly innocent.

So, in short, the situation is this: There is an influential and perhaps dominant theoretical model of criminal law, particularly within the retributive justice tradition on which this paper is focused, that supposes the characteristics of a crime’s victim to be irrelevant to determining how wrong the crime is or what punishment it merits, at least given two instances of a fixed criminal violation. But ordinary moral intuition does not concur, and it is not clear that actual criminal law can plausibly or even coherently be described along the lines the dominant theoretical view proposes. Something is out of joint here. Something—either retributive criminal theory or ordinary moral intuition or criminal law itself—has to give.

This paper argues that retributive criminal theory can and should make a place for victims. It is a critique of the dominant view from within the retributive family. The core of the argument is a moral concept I term “victimization”—the idea that the moral status of a wrongful act turns in part on the degree to which the wrong’s victim is vulnerable or innocent and the wrongdoer preys upon that vulnerability or innocence. The basic claim is that both ordinary moral thought and the doctrine and practice of criminal law are drenched in concern for the vulnerability or innocence of victims—drenched, that is, in the patterns of thought connected to the concept of victimization. I also claim that, with important exceptions, this pattern of differential condemnation and punishment is a good thing. To the extent criminal theory, retributive theory in particular, has denied

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8 See, e.g., 18 U.S.C. § 859 (doubling or tripling the maximum sentence, doubling or tripling any term of supervised release, and increasing the minimum sentence for any adult convicted of distributing narcotics to a person under eighteen).


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those claims, it has misdescribed the criminal law, or mistaken the moral situation, or both.

There are three parts to the argument. First is to get more clarity as to what the victimization concept amounts to and what it is based on, to fill in the moral intuition with philosophical content. Part I is thus an exercise in moral philosophy. Now, it is a basically descriptive sort of moral philosophy; the interest is in “studying morality as a phenomenon or as a set of concepts rather than in preaching.”11 And the line between those can be indistinct: To identify a moral idea’s conceptual foundations is justificatory insofar as those foundations prove to be rational. (The foundations of the victimization concept, as I’ll argue, will prove to be rational.) Nonetheless, the aim here is chiefly to understand and not to endorse or oppose.12

It is one thing to identify a moral concept and another to show the moral concept to be at work in the law. Part II takes up that latter goal. The claim here is that the concept of victimization is at work throughout criminal law and the criminal system—throughout, that is, both the body of legal doctrine that defines and fixes penalties for crime and the practices of our social institutions centrally concerned with crime and punishment (focusing here on empirical studies of police and capital juries). A concern for the vulnerability or innocence of criminal victims, though almost always implicit, unstated on the face of law or policy, runs through it all. Victimization is part of the unstated normative logic of criminal law and the criminal system. Now, again, a caveat: Of course I do not claim that victimization is the only determinant of a crime’s wrongness. Grading the seriousness of offenses is a complicated business, and social cost, individual suffering, the nature and importance of the right invaded, the degree and type of criminal intention—all these and many other factors play a role as well.13 There are even other victim-oriented logics. When we prescribe special punishments for killing the president, it is not a vulnerability- or innocence-based normative logic to which we’re responding; likewise with the many special punishments for attacks against the agents of the criminal system itself (e.g., police officers, judges, prosecutors, witnesses, and jurors). I take victimization to be one of the principles that give criminal justice its normative order, one among a number of moral considerations that go toward answering Hart’s great question.14 It comes


12 One could think of this as a kind of philosophical sociology of the sort explored in different ways by Coleman, Habermas, and Hart. See JULES COLEMAN, THE PRACTICE OF PRINCIPLE, at xvi (2001) (“Corrective justice governs the scheme of practical reasoning found in tort law, and in that sense explains it.”); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 43 (William Rehg trans., 1998) (defending a “dual perspective that should enable us to do two things at once: take the legal system seriously by internally reconstructing its normative content, and describe it externally as a component of social reality”); H.L.A. HART, THE CONCEPT OF LAW 239-44 (postcript) (2d ed. 1994) (characterizing his jurisprudential project as a form of “descriptive sociology”).

13 See generally PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 157-99 (discussing the under-theorized issue of “doctrines of grading” in criminal law).

14 Supra note 1.
into play whenever a crime puts vulnerability or innocence (or, as we’ll see, their opposites) particularly at stake.

As I’ve indicated, the project so far has been almost wholly descriptive. Part I specifies a concept; Part II shows the concept at work in criminal law. Neither argues that we should approve of the concept or want to see it at work in criminal law (though Part I shows it to be at least minimally rational). Those are normative questions, and hard ones. If equality before the law means anything, it means the wrongness of killing one person and killing another, all else equal, is the same—right? But then are we really to think there is nothing morally distinctive about, say, killing a child? About killing a child versus, say, killing a rival gangster? And if we are prepared to acknowledge and approve distinctions of those kinds on a moral level, do those distinctions also belong in the criminal law? When criminal theory clashes with ordinary moral thought, there’s no obvious reason to think criminal practice should follow the latter; perhaps criminal theory represents an ideal to which criminal practice (and moral thought as well) should aspire. Working through some of these normative questions is the project of the Part III. My position will be a qualified yes to victimization. Victimization is in general and at its core a moral insight and an adjutant to criminal justice, but it is also peculiarly prone to distortion, to being misapplied in operation in ways that do indeed offend the basic commitments of a liberal and democratic criminal order. I think of the concept of victimization as being in this way a little like the principle of loyalty to one’s benefactors: a deeply rooted and rationally grounded element of ordinary moral thought that is nonetheless dangerous and often trumped or misapplied, and the kind of thing one does not sensibly oppose or endorse wholesale but rather chaperones, aware of what is best and worst in it. My normative aim is to assist with that awareness. For certainly coming to terms with the concept of victimization in criminal law is a service to justice. Self-awareness is a service to justice.

Finally, a word is in order about the relationship between this paper and the “victims’ rights” or “victimology” literature that has emerged in the last three or four decades. Cornelius Prittwitz has written that the fundamental idea of victimology is that one cannot “look only at the offender . . . in order to understand criminal acts” but must instead view crime as “an interaction” between criminal and victim. To that extent, this paper is unambiguously an entry in the victimology project. At one point in the Moore/Fletcher debate, Moore chastises Fletcher for enjoining him “rather vaguely” to “pay more attention to the place of victims,” and for presenting his own view as a “victim-oriented” retributive scheme without saying what he wants “to do with victims” on this scheme; “talk,” after all, “is cheap.” This paper responds to that charge.

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17 Moore, supra note 4, at 65, 68 (internal quotation marks omitted) (emphasis in original).
of vagueness. It does not speak to everything we might “do with victims” on a victim-oriented retributive scheme, but it gives a relatively precise sense of one of the things we should do with them.

But at the same time, this paper is just orthogonal to many of the concerns that have occupied the victimology/victims’ rights movement, and for that reason I won’t be delving into the literature of that movement. There are, for example, two leading Supreme Court cases and a voluminous secondary literature on the issue of victim impact statements.\(^{18}\) As Moore points out,\(^{19}\) to a considerable extent the issue regarding victim impact statements has to do with good criminal procedure and rules of evidence—e.g., are victim impact statements consistently more prejudicial than probative? Will offenders be differentially punished on account of the expressive skill and passion of victims’ families? Should offenders get different punishment because a particular victim’s family happens to be unusually vengeful or forgiving? The concept of victimization, which turns on the degree to which offenders are more blameworthy on account of preying upon the vulnerable or innocent, just does not bear, or at least does not bear very directly, on these concerns; it is much too specific for that. The more relevant scholarly literature is actually the literature on retributive justice.

Most of all, the goal here is simply to bring into view a fascinating and important phenomenon in our moral life and criminal law. To my eyes victimization runs like a red thread through those two fundamental forms of normative ordering. If only that thread could be lit up, so that it glowed red, we’d be able to make out its path through the fabric. This paper’s aim is to light it up.

### I. THE CONCEPT OF VICTIMIZATION

The first step in explaining the concept of victimization is to bring the intuition of victimization more clearly into view—for though the intuition is a familiar part of moral experience, it has not to my knowledge come in for philosophical examination before.\(^{20}\) And it displays some odd dynamics.

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\(^{19}\) Moore, supra note 4, at 72-73, 85-88.

\(^{20}\) In *The Theory of Moral Sentiments*, Adam Smith touches upon “[o]ur sympathy with the unavoidable distress of [] innocent sufferers,” and elsewhere asks whether there could be any “greater barbarity . . . than to hurt an infant” as “[i]ts helplessness, its innocence, its amiableness, call forth the compassion, even of an enemy.” ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 73, 214 (Ryan Patrick Hanley ed., Penguin 2010) (1759). I think Smith had a taste for the concept I’m calling “victimization,” and it’s not surprising that he, of all people, would in that, of all works, give voice to it. But although he occasionally makes claims of a victimization sort, Smith does not go on to examine the terms of those claims, and the concept has never to my knowledge come in for systematic treatment.
First—a simple point—the intuition really does seem to respond to the vulnerability or innocence of victims. It is spurred when we turn our thoughts to harms or wrongs inflicted upon children, the elderly, the mentally or physically handicapped, or animals, among other groups. It is spurred when we think of people, even grown and able-bodied people, being attacked while in a position of helplessness, as in a beating, and not spurred (though we might yet disapprove of the wrong) when we think of such people suffering merely in the course of combat or other conflict, as in a fair fight. (When, after all, does a fight become a beating? Could we even make sense of that distinction, or at least of its moral valences, without something like the concept of victimization?) Martha Nussbaum has argued that one of literature’s functions is to enable us to see the contours of our moral life more clearly, and there is, as I have already suggested, a great deal of literature, high and low, that plays upon the victimization intuition. A scene from Victor Hugo’s *Les Miserables* helps make the point here.

Jean Valjean, after nineteen years in prison for a trifle, hardened and embittered until “[t]he beginning and end of all his thoughts was hatred,” has just encountered a saintly bishop, who does him a rare kindness and thus throws his soul into confusion. He is in a state of bewildered distraction when “[a] boy of about ten . . . one of those gay and harmless child vagrants” comes upon him, tossing coins into the air and catching them on the back of his hand, “singing as he came.” The boy drops one of the coins, which rolls over to Jean Valjean, who sets his foot on it. “‘Monsieur,’” says the boy, “with the childish trustfulness that is a mingling of innocence and ignorance. ‘May I have my coin?’” Valjean refuses. The boy pleads; Valjean ignores him. The boy starts to cry; Valjean reaches for his stick. The boy becomes angry; Valjean curses and threatens him. Now the boy is frightened. He looks up at Valjean in “a moment of stupefaction” and then turns and runs away without a sound, until off in the distance, pausing for breath, the sounds of his sobbing drift back to Valjean’s dazed, distracted ears. It takes Valjean a few minutes to realize what he has done, but when he does, he calls after the boy, frantically searches for him, gives twenty times what he stole to a priest for the poor, tries to have himself arrested, and finally collapses, crying, calling out to the heavens, “‘Vile wretch that I am!’” And this is the experience that finally breaks his shell; he had in robbing the boy finally done something “of which he was no longer capable.” Now: This is an effective scene; it makes sense. But why? Why isn’t the whole affair trivial? Valjean has

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23 *Id.* at 112.

24 *Id.* at 113.

25 *Id.*

26 *Id.* at 115.

27 *Id.* at 117.
done worse and had worse done to him. Indeed, the aesthetic energy of the scene turns exactly on a deed so minor implying a moral devastation so great. If we were to try to explain the moral devastation, surely that explanation would have to turn on the victim’s being a child; the scene would not work if he were a grown man (unless perhaps he were blind, or mentally retarded, and then it would—which itself is telling). And if we were to scrutinize what makes the victim’s childhood so important, could we avoid speaking of his innocence and vulnerability? These are the terms in which Hugo sells the scene; he goes to great pains to emphasize the boy’s innocent trust and harmless goodwill. And that moment of “stupefaction”—what is it for, as a literary matter, if not to signal a moment at which something significant has happened? Something significant did happen. That was the moment at which Valjean took the child’s innocence away.

Second, vulnerability and innocence are disjunctive. Victor Hugo’s child vagrant was both vulnerable and innocent—children usually are—but to have both together is not necessary for the victimization intuition to take hold. The elderly and physically handicapped are typically just vulnerable, not innocent (although senility might change that). Likewise if two men get in a fight at a bar, one loses consciousness, and the other continues beating him, the victim is also typically just vulnerable, not innocent. Now, the other side of the picture—innocence without vulnerability—is trickier and requires a word about what “innocence” in the victimization context means. I think it has two meanings. There is situation-specific innocence or “bystander innocence,” that is, the state of not being culpable or responsible for the present situation in which one is subjected to a wrong—the adult killed by a stranger while strolling down the street, as opposed to the one killed by an accomplice for a share of the loot after robbing a bank. And there is general innocence, that is, the state of being morally immature in such a way as to lack full agency, and with it, the capacity for both moral guilt and moral stain—the state of being an innocent rather than innocent of something. What links the two is their common theme of blamelessness. But they show up in different factual contexts. And while situation-specific innocence absent vulnerability is easy to imagine—think of the innocent bystander again (in fact, think of why there is such a term as “innocent bystander”—general innocence without vulnerability is harder to come by, if only because being an innocent usually makes one vulnerable. But at least in direct physical confrontations, animals could satisfy the criterion. Sending aggressive dogs into fights to the death, however fierce the dogs, would spur the victimization intuition.\footnote{See, e.g., Robert C. Byrd, U.S. Senator, Speech Following the Indictment of Michael Vick on Dog-Fighting Charges (July 19, 2007) (“The depravity of dog-fighting . . . involves training innocent, innocent, innocent, vulnerable creatures to kill . . . .”)}

Third, the victimization intuition is symmetrical—that is, it not only extends an extra measure of concern to wrongs visited upon the vulnerable or innocent, but also withdraws a measure of concern from wrongs visited upon the aggressive or culpable. (And “culpable” here, being the obverse of “innocent,” also has both
a situation-specific and a general meaning, referring either to someone who is in some way or to some degree responsible for the situation in which a wrong is visited upon her, or to someone who is broadly guilty of serious wrongdoing and thus deeply morally stained, or both.) We are less saddened to hear that a rapist was killed by his victim than to hear that his victim was killed by him. That is not to say we think it good, upon reflection, that the rapist was killed—even those who support executing wrongdoers don’t generally regard rape as a capital crime—but when the judgment is a comparative one, when there is a quantum of badness that must fall somewhere and the only question is on whom it will fall, we prefer that it fall on the aggressive or culpable. In fact, the figure of the culpable victim is a tremendous fund of dramatic tension in popular media. The blockbuster television show Law & Order: Special Victims Unit, for example, started its run with an episode about two rape victims who kill their rapist; the show’s energy comes from the officers’ dilemma over whether to enforce the norm against killing even in that case (they sort of do and sort of don’t). It’s a popular motif.

Fourth, the intuition comes in degrees; it is a more-or-less phenomenon, not an either-or. Attacking a child is an extreme case; attacking a physically handicapped person a little less extreme; attacking a bystander not involved in any criminal enterprise (a “citizen,” as Omar so tellingly put it) a little less still. This makes good sense because the components of the victimization intuition—vulnerability or innocence on the one hand, aggression or culpability on the other—vary by degree. Not all wrongdoing is like this. If a person is killed, his right to life either was invaded or wasn’t, and by and large, the killing either was criminal or wasn’t; it typically doesn’t make sense to say a murder victim’s right to life was “a little” violated. Even for wrongs or crimes that can vary by degree in a sense—theft, say, where the property taken can be more or less valuable—they do not vary by degree in the same sense that victimization does. An act is equally theft whether the thing taken is a hundred dollar bicycle or a thousand dollar watch, but the act is not equally victimization whether the victim is a gangster or a child or a bystander. I like to think of victimization as being like the volume knob on a stereo: In some wrongful acts the volume on the victimization knob is turned up to the max, in others turned down low.

Let’s pause for a moment to note something about how the last few points work in combination. Because the intuition is symmetrical, it can take hold in any case in which a victim is notably vulnerable or innocent on the one hand, or aggressive or culpable on the other. Because the intuition is disjunctive, those two pairs represent four possibilities—the victim can be notably vulnerable, innocent, aggressive, or culpable. And because the intuition is analog, it can take hold to a small degree even in cases where “notably” doesn’t mean very much, where the victim is only a little vulnerable or innocent or a little aggressive or

29 Law & Order: Special Victims Unit: Payback (NBC television broadcast, September 20, 1999).

30 Supra note 2 and accompanying text.
culpable. These three points together work to greatly expand the range of cases to which the intuition applies. Previously it might have seemed that the intuition is reserved for extraordinary cases, like crimes upon children. But given the logic of the above, it should apply also in minor situations in which the victim is just a little responsible for bringing the crime about (or the opposite), or a little more vulnerable than average (or the opposite). And indeed, the intuition does take hold in such cases. After the attack upon the “Central Park Jogger,” it was not uncommon to hear someone point out that she was, after all, running through Central Park at night—pointing it out perhaps apologetically, for fear of appearing to excuse the crime, but withdrawing a little sympathy for a little responsibility (not even culpability!) nonetheless.  

It is not uncommon in the current financial crisis to hear a little extra sympathy going to those who were encouraged to make bad investments while lacking the financial education to understand the risks, and a little less sympathy to the “big fish” institutional players and wealthy individuals who were similarly misadvised or ripped off. In other words, the victimization intuition is not just reserved for extreme situations but is at work all the time, on both ends of the moral spectrum, as if there were a hypothetical median victim to whom every other victim is compared and found to be either more or less vulnerable or aggressive, innocent or culpable. As I see it, the intuition is most interestingly and importantly at work where the situation is extreme—with child victims and gangster victims and so on—but it is not only at work in such cases. It is a general and basic feature of moral life, a regular part of the way in which we go about making judgments of blame and wrong.

There’s more to say about the victimization intuition, but I think the above suffices to bring it basically into view. Two concluding notes are in order, however. First, the intuition, being merely an intuition, may have fuzzy edges—that is, the intuition may be ambiguous or ambivalent in certain ways, not because of a failure to see it clearly, but because as an intuition it lacks the propositional content to answer all the reasonable questions that might be asked of it. This is as it should be. The hard questions have to await a conceptualization of the intuition, and indeed the process of conceptualization is partly a process of trying to find good answers to those questions.

Second, and crucially, to describe the intuition and to recognize it at work is by no means to endorse it, and particularly not to endorse it in full. I don’t endorse it in full. Someone who tried to diminish the wrong done to a rape victim by saying she dressed provocatively may be invoking the victimization intuition, but it seems to me invoking it in an objectionable context. It is common in the

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31 The Associated Press, Central Park Jogger: Oprah Offended Me, NEWSDAY, Nov. 15, 2007 (“In a 2002 interview for O, the Oprah magazine, the talk show host asked victim Trisha Meili—known as the ‘Central Park Jogger’—why she was running alone in the park at night. At the time, Meili, whose name was withheld, told Winfrey she realized it was ‘not a smart thing to do,’ but that didn’t justify the attack in which she was raped, bound and severely beaten. Meili told New York 1 TV Wednesday that if she were asked the question now, ‘I’d say, ‘If that isn’t a blame the victim question, I don’t know what is. . . . It’s like, ‘Okay, so it’s my fault that I was out there?’”’).
United States today to act as though the high incidence of rape in prison is a matter of indifference or dark comedy, and surely that is the victimization intuition at work; the people who are prepared to treat the issue lightly would not do so if it were anyone but criminals being raped. But they are in the wrong; mass prison rape in the United States is a serious human rights violation. And it is common when one learns of an act of aggression against some village or ethnic group or other community to hear it noted that the aggressor killed (or spared) the women and children; that is taken to be a matter of special moral import. But why not the men? They could put up a better fight, perhaps, but so what? They never should have been attacked, and when they were, good fight or no, they lost. The moral judgment here, which I think is very deeply rooted (how often does one hear some reference to “saving the women and children”?), should at least be a matter of some doubt. Yet one can acknowledge all this and still think, as I do, that often the intuition is onto something, that there is something more wrong about raping a young child than about other (still terrible) adult rape, that if someone is going to be killed in a confrontation, better the rapist than his victim. A lot of moral intuitions are like this; they fire and misfire. We have to see them clearly to think them through, and part of the point of thinking them through is to see where the misfiring occurs.

A. Some Explanations That Don’t Work

We turn now from bringing the intuition into view to trying to explain it. Let’s start by taking note of some prominent modes of philosophical moral explanation that don’t work here.

First, the concern for victimization cannot be explained on the basis of rights. The first and most astonishing feature of victimization is that a person can in two instances invade the very same right in the very same way, and yet one of those two instances can be both worse and more blameworthy than the other. In the language of criminal law, the same actus reus with the same mens rea can be wrong to different degrees based on characteristics of the victim. That should impress us as a deep puzzle. On some views, a wrong just is the invasion of a right. In particular, some forms of deontology picture human beings essentially as rights-holders and by implication understand wrongdoing essentially as rights-invasion. And of course rights-talk is common to ordinary moral discourse as

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32 Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609, 15601(2) (2003) (“[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison.”); NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT 25 (2009) (“Many still consider sexual abuse an expected consequence of incarceration, part of the penalty and the basis for jokes; . . . .”).

33 Jules L. Coleman, Contracts and Torts, 12 LAW & PHIL. 71, 90 (1993) (“A wrong is conduct contrary to the rights of others, what might be called a rights-invasion.”). Note, however, that Coleman distinguishes between “wrongs” and “wrongdoing” in the article; his view of the moral universe of wrong is broader then the quoted sentence might make it seem.

34 See, e.g., F.M. KAMM, 2 MORALITY, MORTALITY: RIGHTS, DUTIES, AND STATUS (2001). I do not mean to imply here that no deontological theory could account for victimization; only that some cannot.
well as philosophical theory. A concern for victimization is on any such view impossible or almost impossible to make sense of. One could, I suppose, try to generate an account of victimization concerns in terms of rights—arguing that there is a "right not to have one's innocence taken away" or something of that sort. But I think the attempt would fail at least with respect to the vulnerability half of the intuition, and would be implausible with respect to innocence as well. If the concern for victimization is minimally rational, we have to accept that two invasions of the same right might not have the same normative status or even be the same normative phenomenon. To steal from a blind person and from a sighted person is not the same thing, though in both cases the right invaded is the right to property.

Second, victimization cannot be explained on the basis of norm violation, another common deontological focal point and the main issue in retributivist accounts like Michael Moore's. If on the one hand we define norms in general terms that make no reference to victims—e.g., "Intentionally taking another's property is wrong."—the problem is exactly the one we just saw with respect to rights-based accounts of wrongdoing: Two violations of the same norm can imply two different degrees of wrongdoing, which, if wrongdoing just is norm-violation, is impossible. If on the other hand we define norms such as to include reference to victims—e.g., "Intentionally taking another's property is wrong, and intentionally taking a blind person's property is even more wrong."—we simply beg the question of why victims are taken to matter. This is the problem with Moore's argument that victims are naturally taken up in various criminal norms themselves, as when statutes concerning sexual assault expressly provide for special punishments when the sexual assault is committed against a child. That sort of norm is not an explanation of the concept of victimization. It is evidence of the concept of victimization.

Third, victimization cannot be explained by reference to harm or suffering—a common mode of explanation among consequentialists and particularly utilitarians, and one that is also obviously taken up in the moral discourse of everyday life. The blind person who has his wallet stolen does not necessarily or

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35 See supra note 4 at 69 ("Fletcher appears to attribute my theoretical indifference to victims to my preoccupation with norm violations by criminals, yet all retributivists . . . care about norm violations in criminal law.").

36 Id. ("Any kind of retributivist needs a norm violation to justify punishment. It is at this point that victims come in substantively. Victims come in as part of the content of those norms."). This is the philosophical form of an argument I earlier poked fun at in legal form ("Are we then to think that no characteristic of a crime's victim should matter, unless the code says it does, and then it should?"). Supra p. 3.

37 See, e.g., JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859) ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). Again, I don't mean to imply that no consequentialist theory could account for victimization; only that some cannot. Note also that harm and suffering are not identical. The parent who sends her ne'er-do-well child to military school, thinking (correctly) that it will make him miserable for a time but happier in the long run, imposes suffering but not harm; likewise the doctor who
even probably suffer more, and is not necessarily or even probably harmed more, than the sighted person who has his wallet stolen. The child who is beaten up won’t feel more pain than the adult who is beaten up, and might well heal faster and better, mentally and physically. Indeed, there can be considerable suffering and harm with very little victimization (as when Omar assaults a drug dealer) and considerable victimization with very little suffering and harm (as with Jean Valjean and the vagrant boy); the two categories, that is, can become almost totally unfixed from one another. Now, it is not always so. I think people do believe that the raped child is typically more harmed than the raped adult, harmed though the adult may be—and I also think that that belief is true. But why is the child victim of rape especially harmed? It seems almost impossible to explain the additional harm without reference of some kind to the premature invasion of the child’s sexuality—which just is a form of innocence. Likewise, an elderly person might be predictably more harmed by the same physical assault as an ordinary adult, but if we were to explain why, we would have to say something about the brittle physical situation of the elderly—that is, about a feature of their vulnerability. In other words, where victimization is at work, it functions either independently from the degree of suffering and harm or as the explanation for the degree of suffering and harm. It cannot be explained by the suffering and harm.

Fourth, victimization cannot be fully explained on the basis of social cost or deterrence—other common modes of instrumentalist or consequentialist explanation in moral and criminal theory. The problem with explaining victimization in terms of social cost is parallel to the problem with explaining it in terms of individual cost (that is, in terms of suffering or harm). First, social cost and victimization can move independently and even in opposing directions: The murder of a very elderly person past her productive working years, for example, would ordinarily be thought to involve less social cost than the murder of a middle-aged person with many productive years left, but the first involves a high degree of victimization, the second, all else equal, a lower one. And second, where social cost and victimization do move together—if, for example, we regard the death of the rapist as less costly as a social matter than the death of his

performs a painful operation. The two categories, however, are related enough to be treated together here.

38 See Kennedy v. Lousiana, 554 U.S. __, 128 S.Ct. 2641, 2676-77 (2003) (Alito, J., dissenting) (discussing evidence of the long-term effect of rape on children, including the estimate that “as many as 40% of 7- to 13-year-old sexual assault victims are considered ‘seriously disturbed’”).

39 There is a tendency among some criminal theorists to act as though criminal law’s very subject is harm or suffering, and to speak of retributive justice along the same lines. Both attitudes are in my view just confused. See Albert Alschuler, The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next, 70 U. CHI. L. REV. 1, 19 (2003) (“Part of retributivism’s bad press stems from the perception that its object is to match punishment to harm. . . . Desert, however, not harm, is what retributivism is about, and desert depends as much or more on circumstances and personal characteristics as upon physical actions and harm.”).

victim—the explanation of that judgment turns on the diminishment of the wrongdoer’s social value on account of his wrongs, or in other words, with his culpability. Now, deterrence is a more complicated issue because it is possible to harmonize deterrence-based explanations with the victimization intuition to some extent. One could say, for example, that some extra measure of censure and punishment is necessary to adequately deter wrongdoing against those who can’t deter it of their own power. But that would at most explain the vulnerability prong of the victimization intuition. It would not explain the innocence prong: it would not, for example, give us a reason to condemn bystander murders more harshly than inter-gang murders (unless one already assumes the murder of a bystander to be the more serious crime, at which point we are begging the question again). Actually inter-gang murders are the more significant social problem, and, all else equal, should likely get harsher treatment where deterrence is in the driver’s seat. But it is the bystander crimes that excite our moral intuition, and as I’ll show, our criminal law as well.  

Finally, victimization cannot be adequately explained on the basis of sympathy or empathy—the typical focal point in scholarly work that, lacking the concept of victimization, nonetheless touches on victimization issues. I say “adequately” because there is no question that strong feelings of sympathy and empathy are at work in the experience of confronting predation upon the vulnerable or innocent; that sort of confrontation is a passionate experience. One could even imagine a good evolutionary case for why we would feel intense passions in the victimization context, centering on our reproductive interest in the safety of children. But even if true, this sort of psychological explanation is not a substitute for philosophical or normative explanation of the kind this paper attempts. For one thing, there is a difference and a degree of independence between those two forms of explanation. The one is a matter of motivation. The other is a matter of testing whether our motives are based on or linked to ideas that we can reflectively endorse. It is not enough to know that the invasion of the bodies of children, sexually or otherwise, fills us with horror and disgust, or even that it fills us with horror and disgust because we have an evolutionary interest in the well-being of children, because we want the ground for that horror and disgust; we want to know whether and how it is justified. Second, if the two forms of explanation are too independent for the one to take the other’s place, they are also too interdependent for that substitution—for our emotions are themselves evaluative in character, subject to correction where those evaluations

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41 One last point, of a different kind, is in order on this issue of victimization and deterrence. The fact that a deterrence-oriented criminal theory can find some common ground with the concept of victimization is not to my mind an objection to the concept. It just shows that the concept has legs, that it has something to offer those with more instrumentalist perspectives on criminal law than my own. This paper is written from the standpoint of retributive justice, but the thesis is about victimization, and victimization is not genetically linked to retributivism. If deterrence-oriented theorists find it interesting to notice how victim vulnerability plays into their focus on raising and lowering the costs of crime, so much the better.

go awry. We would not want a moral or criminal system that excused the beautiful and condemned the ugly. We want our normative systems to act on principle, and sympathy and empathy alone, taken purely as facts about our passions rather than as elements in moral reason, are too standardless to serve as moral guides. Indeed, to ask for normative understanding is to fashion our passions into moral guides.

But if we do not chalk victimization up to passion and sentiment, what is left to explain it? We have just rejected many if not most of the classic modes of moral explanation—explanations in terms of rights or norms or in terms of individual or social suffering, harm, or cost. It may be tempting at this point to think that the concern for victimization cannot be rationally accounted for, and must therefore be regarded as irrational. But I think that is too quick. Moral life is subtler than moral theory. When the two are out of sorts we should not be too quick to think it is moral life that has gone wrong.

B. A Moral Relationship

There are different ways of thinking about wrongdoing—that is, not just different views as to what should count as wrong, but different views as to what wrongdoing itself is. I’d like to focus here on a contrast between thinking of wrongdoing as conduct that violates a norm and thinking of it as conduct that violates another person. That is a slippery distinction, and it’s useful to bring some paradigms to mind to keep the two straight. So for the first—“norm violation”—think of Eve eating the forbidden fruit; the reason her conduct was wrong had to do with an obligatory norm laid down by God. For the second—“violation of others”—think of Cain killing Abel; the reason his conduct was wrong had to do with a claim arising out of Abel (out of his personhood, for example). Now, one could imagine being a partisan of one of these two modes of thinking about wrongdoing and trying, on the basis of that mode of thinking, to colonize the field. A partisan of the “norm violation” camp, for example, could focus in the Cain and Abel story on Cain’s violation of the norm against murder rather than on his violation of Abel. A partisan of the “violation of others” camp could focus in the Eve and the apple story on Eve’s violation of God’s trust rather than on her violation of God’s rules. My own preference generally is not to choose from between these two modes of thought but to keep them both in play, regarding each as having its own core areas of strength. One core area of strength for the “violation of others” model is its capacity to make sense of the concept of victimization.


44 Some authors make a distinction between a “wrong” and a “wrongdoing,” supra note 33, or between a “wrongdoing” and something “wrongful,” infra note 45. I find that sort of distinction confusing. “Wrongdoing” here just means “doing a wrong,” and “wrongful” is just the adjective form of the same idea.
Various ideas arise in connection to this distinction, many in the context of criminal law. One thinks of the *malum in se/malum prohibitum* distinction. One thinks of the literature on victimless crimes (or victimless wrongs). The criminal law theorist George Fletcher draws a distinction in this area between “wrongfulness” and “wrongdoing,” where the concept of wrongfulness “highlights the conduct standing in violation of a rule of law” and represents “the logical dissonance between [the] behavior and the rules of criminal law,” whereas the concept of wrongdoing “derives not from the violation of a rule but from a characteristically dangerous way of doing harm to others,” relying “[at the core] on “an invasion against the victim’s interests.” To my mind, however, the most thorough exposition of this issue is to be found in the philosopher Michael Thompson’s remarkable paper, *What Is It To Wrong Someone?* The question Thompson takes up in the paper is: How do we think about ourselves and our duties when we are committed to doing what is just? What is the posture of mind of a person oriented to justice and trying to determine what in some particular situation justice requires of her? The term “justice” here carries its traditional (indeed ancient) sense, naming “a virtue of individual humans like you and me,” rather than its modern sense concerning “a feature of the larger social structures into which we fall”; the question is how we think about ourselves and our duties when we are exhibiting the virtue of justice. What Thompson picks out is the relational—or as he puts it, “bipolar”—aspect of such thought: “The mark of this special virtue of human agents is that it is ‘toward another.’ . . . It is characteristic of the individual bearer of justice . . . to view herself as related to others, and as other to others …. That is, whatever the particular content of our thoughts regarding justice, the grammar of the thought is that there is a me and a you linked together in a certain morally charged relationship. As Thompson puts it, there is in the mental posture of justice a “yoking of agent and agent” in a “formally distinctive type of practical nexus.” Or in a particularly compelling image: “The two agents are for me like the opposing poles of an electrical apparatus: in filling one of these forms with concrete content, I represent an arc of normative current as passing between the agent-poles, and as taking a certain path.” The concrete content in that image

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47 Thompson, *supra* note 46, at 337.

48 Id. at 337. That last phrase, “as other to others,” has a certain mystery about it. But it simply means that the just person not only has regard for others but also understands that others must view her in the same way. She apprehends herself as part of a normative order in which all alike are other-regarding, and she is one among them all.

49 Id. at 345 n.19

50 Id. at 335.

51 Id.
can be any particular claim of justice—that agent A owes agent B an apology, that B owes A performance on his contract, that A trespassed on B's land or on his freedoms or whatever else—but what absorbs Thompson's focus are not those particularities but the structure in which they fall, the very fact of those two poles and the normative current passing between them. The posture of mind characteristic of justice is that one sees oneself as occupying one of those poles and all others with whom one comes into moral contact as occupying another. Justice, in short, is an other-regarding virtue. In that essential submission, Thompson is far from alone. He himself cites Aristotle, Aquinas, and Kant for the point.\(^5\) Many others could be added; it seems to me that this is a point on which much of the philosophical tradition concurs.

From this base, Thompson develops a more refined version of the initial contrast I offered between Eve’s wrong and Cain’s, between wrongdoing as a violation of norms and wrongdoing as a violation of others. In Thompson’s terms, this is a contrast between a “bipolar normativity” and a “merely monadic normativity,” between a form of moral life in which we say “X wronged Y by doing A” and one in which we say only that “X did wrong in doing A”—Y having dropped out of the picture.\(^5\) The latter, then, is a two-part relation between agent and norm; the person wronged is incidental to the statement of the moral issue (though potentially necessary for the norm to have been violated at all). The former, by contrast, is a three-part relation between the wrongdoer, the wronged, and the norm in light of which the relationship between those two has become infected with some wrong.\(^5\)

One could wonder what this difference really amounts to. It seems possible to re-describe most or perhaps all bipolar moral claims as merely monadic ones—“Cain did wrong in murdering” rather than “Cain wronged Abel in murdering him”—and perhaps it would be possible to go the other direction too, redescribing merely monadic claims as bipolar ones (though that seems more difficult). Thompson tells us that “tradition and intuition alike assign [the merely monadic claims] a place very different from that occupied by our bipolar forms,”\(^5\) and that may be, but is there some more definite reason for the distinction than mere fidelity to tradition and intuition? I think there are four such reasons. First, merely monadic and bipolar modes of thought involve a major shift of emphasis, and the placement of emphasis is an important matter in normative thought. Second, whether we take a monadic or bipolar view of some type of wrongdoing will affect our redressive scheme because the distinction bears on whether the claim for redress belongs to the community or to the victim. A monadic understanding of promise-breaking, for example, would suggest that anyone

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\(^5\) Id. at 337.

\(^5\) Id. at 335, 338.

\(^5\) Id.

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\(^5\) Thompson associates the idea of a merely monadic normativity with deontology. Indeed, he proposes that his bipolar alternative be considered an alternative to deontology—as “dikaiology” (trading on the Greek term for what is “just,” “fair,” or “right). Id. at 338.
might take action to rectify the breach—the issue being that A broke a promise, rather than that A broke a promise to B—whereas a bipolar understanding would suggest that the demand for redress belongs to the promisee. This question of redressive form is of course a major issue in the law. Third, and relatedly, our social practices often fall into monadic or bipolar forms already, and thus become inaccessible or unintelligible if we don’t have recourse separately to each of the two options. Forgiveness, for example, is bipolar: I cannot forgive a wrong done to you. Contract law—to return to our example of promising, now in legal form—is also bipolar: the claim for breach belongs to the promisee. A merely monadic view of moral life would seem unable to explain social practice on these fronts. Fourth and finally, as Thompson argues, the verdict of monadic and bipolar moral judgment may diverge even in one and the same instance—a most striking claim. “If, for example, you are making an unjustly intrusive enquiry, and I tell you a lie in response, it certainly doesn’t seem that I wrong you. But a lie would cover me with shame nevertheless.” I like to fill this example in with the thought of a Nazi soldier asking a Jew to identify his religion and ethnicity, intending to cart him off to the camps if the answer is Jewish. A lie does not wrong the Nazi. But one might be ashamed of it nonetheless.

Something important for victimization purposes happens in Thompson’s explanation of this example. If you mount an unjust enquiry and I lie in response, Thompson says, the account of this moral event would of course have to include you in some sense—you’re part of the story. But you would be, as Thompson memorably puts it, “the occasion, not the victim, of my fall.” This is the first use of the word “victim” in Thompson’s study of wrongdoing, and it is no coincidence that it should be found here, in his explanation of what is missing in a monadic and present in a bipolar normativity. One of the fundamental differences between bipolar and monadic forms of moral thought is the different positions they give victims. In a monadic normativity, the victim is always in some sense incidental, always, at most, just the occasion of a fall. Sometimes a monadic wrong may have no victim or no clear victim at all (think again of Eve and the apple). But even when there is a victim in a literal or causal sense, a monadic way of thinking makes the victim incidental to an understanding of the wrong—of understanding why the wrong was wrong. Consider again the story of Cain and Abel: If the essential thing is that Cain violated a norm against murder, Abel is relevant only in the sense that he was the site at which the norm was violated—he was, like the Nazi lied to, only the occasion of Cain’s fall. But on a bipolar

56 The issue of redress in the right way is, in my view, the major concern of a court system. See Joshua Kleinfeld & Jörg Schaub, The Place of Redressive Justice in the Concept of Justice (working paper).

57 See Nicholas Wolterstorff, Does Forgiveness Undermine Justice, in GOD AND THE ETHICS OF BELIEF 219-47 (Andrew Dole & Andrew Chignell eds., 2005) (“[O]ne cannot dispense forgiveness hither and yon indiscriminately. Specifically, I can forgive you only if you have wronged me, and only for the wrong you have done me.”)

58 Thompson, supra note 46, at 339.

59 Id. at 340.
understanding, the essential issue is the violation of Abel; the two of them are in a
moral relationship—“like the opposing poles of an electrical apparatus”—and the
very nature of the wrong has to do with the way in which Cain’s violence trod
upon that relationship. In a word, bipolar wrongdoing is victim-creating. And
that is why it is part of the substrate of the concept of victimization.

Thus we arrive at a fundamental moral contrast. One can think of moral life
as fundamentally involving relationships between persons and norms or one can
think of moral life as fundamentally involving relationships between persons, or
both; by the same token, one can think of wrongdoing as fundamentally involving
norm violation or one can think of wrongdoing as fundamentally involving the
violation of others, or both. Only the bipolar view makes victims essential to
understanding the nature of the wrong in view.

Now, there is a great deal of thought about how law works swirling around
this monadic/bipolar contrast. Thompson takes the expression “bipolar” from the
legal theorist Ernest Weinrib, for whom bipolarity is the molten core of private
law. Monadic normativity, meanwhile, is characteristic of public law. On the
one hand, the claim belongs to the wronged and the architecture of the suit is
offender versus victim, with the victim seeking recompense; on the other, the law
issues in a “Thou shalt not,” and the architecture of the suit is offender against
community, with the community insisting that its norm be upheld. Indeed, for
Thompson, the very model of “merely monadic normativity” is criminal law. A
subsection of his paper is entitled, “Positive Law Encodes Our Opposition in the
Distinction Between Private Law and Criminal Law.” He writes: “The verdict
of the jury, ‘Guilty!’, expresses a property of one agent, not a relation of agents.
If another agent comes into the matter—if there is, as we say, a ‘victim’—it is, so
to speak, as raw material in respect of which one might do wrong.” Indeed,
Thompson goes farther still, suggesting not only that criminal law reflects a
monadic form of thought but that criminal law is “the implicit model” whenever
discussion of wrongdoing takes a monadic turn. Thus for him criminal law
actually becomes the ground of monadism rather than monadism the ground of
criminal law.

And this is where I dissent. Thompson has basically arrived here at what I
earlier called the “dominant view” of criminal justice, which I associated with
Michael Moore. Criminal law on this view is understood as a system committed
by its very architecture to monadism; a system in which victims, if any there are,
serve as the occasion for a wrong rather than as part of its definition; and a system
in which the essential thing is to uphold and defend the community’s norms rather

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60 Id. at 344 n.18, citing ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1996).
61 Id. at 343.
62 Id. at 344.
63 Id. at 345.
64 See supra note 3-10 and accompanying text.
than to vindicate the violations of victims. There are deep structural grounds for this view. And formally it is so. But operationally it is not so, at least not consistently and not in full. Consider, by way of contrast with Thompson’s picture, this one from George Fletcher:

As the criminal law has matured in the last few centuries . . . the movement has been away from paradigms of wrongdoing toward rules laying down the definition of offenses. In all the jurisdictions of the Western world, the legislature has gained the upper hand over courts. And with legislative dominance has come to the method of law-making in which legislatures specialize: formulating rules that define offenses. The violation of state-supported rules has displaced the violation of the victim’s interests as the rationale for punishment. . . . Yet the ancient idea of crime as wrongdoing, as a paradigmatic wrong against a victim, continues to shape the rhetoric of prosecutors and the passions of the public. . . . In modern systems of criminal law we must live with an uneasy accommodation of wrongdoing (the violation of victims’ interests) and wrongfulness (the violation of rules).  

If Thompson, the philosopher, had the better pure moral account of bipolar and monadic thought, Fletcher, the criminal lawyer, has the better account of the law. For Fletcher, the monadism in criminal law is an historical and institutional phenomenon, not an essential one—and there are chinks in the armor. I agree with that. What I would add is that the chinks are to be found in specific and identifiable places. Part of the purpose of this paper is to highlight where those places are.

We are thus now in a position to state this paper’s thesis more technically and precisely than was possible at the outset. What this paper is against is a merely monadic conception of criminal law. Criminal law is structurally monadic, but it is operationally bipolar, at least sometimes and to some extent; criminal law in action is drenched in bipolar normativity. Indeed, one way of thinking about my point is that the gap between criminal law and tort law—cousins both conceptually and historically—is not as wide as it is generally taken to be. The private and public systems of redressing wrongdoing do not occupy wholly different universes; victims’ place in the normative order of criminal law is too great for that.

C. Vulnerability and Innocence

There is one last piece to the philosophical puzzle. Bipolar normativity, with its understanding of wrongdoing as fundamentally one person’s violation of another, brings the victim back into moral picture, making his or her situation a

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65 Fletcher, supra note 45, at 80.

66 See Tony Honore, The Morality of Tort Law—Questions and Answers, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 74 (David G. Owen ed., 1995) (“Tort law and criminal law have common features. Each aims to eliminate or reduce undesirable behavior, each provides for sanctions to be imposed on those whose conduct is undesirable, and each poses difficult questions about the conditions for imposing sanctions and the extent of liability of wrongdoers.”).
part of our moral understanding. We can thus start to see why a victim’s individual characteristics might matter. But we have so far said nothing about vulnerability or innocence. Bipolar normativity is like the big circle in a Venn diagram, victimization the little circle within it; there are other varieties of bipolar normativity, other victim-oriented normative logics, that don’t particularly put vulnerability or innocence at stake. I earlier mentioned the special penalties in criminal law for harming political officials (which would seem to turn on concerns for preserving the democracy) or the agents of the criminal justice system itself (a sort of prior condition for having a functioning criminal law at all). Some cultures with Confucian moral traditions specially protect ancestors; ancient Greek society specially protected what for them was the near-sacred relationship between guest and host. Bipolar normativity is the philosophical substrate of it all, but we came to that broad moral category in an effort to understand something more specific—the particular form or manifestation of bipolar normativity that is victimization, predation upon the vulnerable or innocent, the way in which a normative relationship can become distorted or infected with which our moral culture is so markedly concerned. This particularity is what remains to be explained.

Now, I don’t think there is one single explanation of the entire victimization phenomenon here. Rather, there are related, but separate, explanations for the innocence prong of the concept, on the one hand, and the vulnerability prong on the other. These explanations—in fact, they are higher-order values or commitments to which the victimization intuition is responding—can operate singly or cohere together depending on the facts in a particular case.

As to innocence, I submit that the major value driving the victimization intuition is our higher-order commitment to just deserts. When we learn of a gangster shot by a rival, the reason we view the killing as less bad than the bystander shot by a gangster is that the murdered bystander is less deserving of his fate than the murdered gangster. That is not to say the murdered gangster deserved to be killed, but it is to say that, comparatively, he was more deserving of it than the bystander. (Perhaps it would be better to say that he was less undeserving.) Desert here has two parts. The murdered gangster’s situation is marked first by assumption of risk, which makes him more responsible for his fate than the bystander. It is marked, second, by wrongdoing, which makes him less

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67 Damien P. Horigan, *Observations on the South Korean Penal Code*, 3 J. KOREAN L. 139, 155-56 (2003) ("Some parts of the [South Korean] Penal Code have retained what can be best described as a latter-day Confucian tone. . . . Among the various forms of homicide there is a special provision for killing one’s lineal ascendant or the lineal ascendant of one’s spouse. A somewhat similar provision can be found for battery. Likewise, abandonment of a lineal ascendant along with cruelty to or intimidation of a lineal ascendant are crimes.")

68 HAROLD BLOOM, HOMER’S THE ODYSSEY 17-18 (2007) ("A second central Dark Age institution [in ancient Greece] is denoted by the Greek word xenia, which means ‘guest-friendship’ or hospitality. . . . It is the closest thing in the world of Homer to an absolute moral mandate . . . . Much of the Odyssey concentrates on the fulfillment and perversion of the demands of xenia.")
undeserving of that fate. Now, those two can come apart. If Bernie Madoff were randomly mugged walking along the street, having done nothing to assume an unusual risk of being mugged, he is nonetheless sufficiently morally stained that, if someone is going to be mugged, we’d rather it be him than an average, honest working person. At the same time, if an average, honest working person were to consistently take a shortcut home from work through a bad neighborhood, knowing the risks, we would rather she be mugged than the person who took no such risk; taking the shortcut is not a wrongful act, but it is something for which a person who knows the risks is responsible. And in extreme cases, where both culpability and responsibility are at a high pitch, we might think it not just comparatively better for a deserving party to suffer, but a positively good thing that she suffers. We have all seen dozens of movies and television shows in which the villain gets what’s coming to him at the end, and it is the rare person who finds that sort of ending morally uncomfortable—despite the fact that “what’s coming to him” would often be assault under any normal circumstances. The trope is so familiar that it usually passes beneath moral notice. But of course, it only works because the villain is a villain, and he brought it on himself.

Thus the reason—or at least, the first reason—that predation upon the innocent offends us more than identical predation upon the culpable has to do with just deserts. We have a stake, socially, in a just universe—in the achievement of what Kant termed “the Highest Good.” Predation upon the innocent offends that goal. And thus we have a partial resolution of the puzzle of how the very same act can, depending on the characteristics of the victim, be more or less bad or wrong. It is more or less bad or wrong because the innocence or culpability of the victim changes the position of the act with respect to justice.

As to vulnerability, I submit that the value driving our intuitions is a value that might be called beneficence. The key idea is that a vulnerable person’s lesser capacity to care for himself imposes on others a greater responsibility to care for him—for we have a stake not only in a just universe, but also in a humane one. It is different, morally, to walk down the street and notice a lost-looking adult than to walk down the street and notice a lost-looking toddler; a different sort of normative current passes between the agents and links them together. Any two

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69 This is general rather than transactional culpability—that is, Madoff’s wrongdoing is causally unlinked in the example from the wrong visited upon him. The case is different from the bank robber killed by an accomplice after a heist, and there’s something troubling about applying the intuition without transactional culpability, as if some people are morally stained such that they just walk through the world with less claim on the criminal law’s concern. I think the concept of victimization ought not to be applied in such cases, at least for purposes of deciding matters of blame. Perhaps we might make a distinction here between blaming and mourning, allowing ourselves to mourn the innocent victim more than the one who is generally morally stained without necessarily blaming the offenders differently. (After all, it’s not as if the random mugger knew it was Bernie Madoff he was robbing.) Yet however much we believe upon reflection that the intuition should be cabined in cases like this, as a matter purely of describing the intuition, I think there is no question that it is commonly at work even without transactional culpability.

70 IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON, in IMMANUEL KANT: PRACTICAL PHILOSOPHY 226-46 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996).
people who encounter each other, even just passing by on the street, are put into some sort of a moral relationship from the standpoint of bipolar normativity—a standpoint in which the agent always takes herself to be “related to others, and as other to others.” But it is just an abstraction to think all such relationships are exactly the same, a failure to take the concreteness of the other into account. What vulnerability does is change the character of the relationship between two linked persons; it adds a layer to their relationship. To walk away from the lost toddler manifests a degree of human indifference that walking away from the lost adult does not.

Thus we can again address the puzzle of how the very same act can be, depending on the characteristics of the victim, more or less bad or wrong. It is more or less bad or wrong because the vulnerability of the victim changes the character of the relationship between victim and agent in such a way that the act—the very same act—registers differently with respect to beneficence. And we have a stake, socially, in building a society committed to beneficence.

Those two values are, I think, the two basic, major values at work in the concept of victimization. But there are a few, miscellaneous others worth noting. In situations involving general (not situation-specific) innocence—that is, in situations involving an innocent—there is something at work much like the vulnerable person’s need imposing on others a special responsibility to be caring: The innocent’s trust puts others under a special responsibility to be trustworthy. The financial advisor who rips off a child has done something morally different, though literally identical, as the financial advisor who rips off a professional investor. The latter is merely to defraud; the former is both to defraud and exploit. In addition—and old-fashioned an idea as it might be—I think it is still true that we simply place special value on child-like innocence, that we think of it as a good just as we think of beauty or knowledge or happiness or whatever else as a good, and as a good, innocence calls on us to act in such a way as to protect and preserve it. Thus there is something worse about a deed that shatters innocence as compared to the very same deed where it does not. To rape an adult is to violate a person’s sexual self-determination. To rape a child is both to violate a person’s sexual self-determination and to shatter a person’s innocence; there is an extra wrong done.

Two closing points are in order. First, as touched on above, these various grounds for the special status of vulnerability or innocence can come apart or come together in a variety of different ways depending on the facts of a particular case. They all seem to cohere in instances of wrongs done to young children, and that is not surprising: Those wrongs spur the very strongest sense of outrage over victimization. But in other cases they can fall into other combinations. The typical innocent bystander is undeserving of harm, but not necessarily vulnerable. The innocent bystander who is also blind would be both undeserving of harm and vulnerable, but still not generally innocent in a way that imposes on others a duty.

71 Thompson, supra note 46, at 337.
to preserve her innocence or to reward her trust by being especially trustworthy. The innocent bystander who is also blind and mentally disabled would have, as it were, the entire victimization package. In other words, these various grounds are analytic tools with which to see how the concept of victimization should apply in a particular case.

Second, I’ve been applying the concept of victimization chiefly to acts; the focus has been on how the same act can be better or worse depending on characteristics of the victim. But the concept also applies to actors: There is something more blameworthy about the person who directs his wrongs against the vulnerable or innocent than the one who does not; something about victimization-style wrongdoing seems to reflect back upon the wrongdoer in a particularly vivid way. And we are now equipped to see why. One’s treatment of the innocent is a measure of one’s commitment to the project of building a society based upon justice. Someone who preys upon the innocent has, as it were, launched himself out of that project. Likewise, one’s treatment of the vulnerable is a measure of one’s commitment to the project of building a society based upon beneficence; to prey upon them is a rejection of that social project, with all the features of character a rejection of that sort implies. I suspect it is partly victimization we have in mind when in criminal law we speak of “depravity.” And by contrast, think again of Omar, committing acts of robbery for a living, inviting and sometimes involved in violence, yet still a heroic character in the story in which he plays a part. How is that possible? It is possible because, having “never put [his] gun on no citizen,” Omar never turned his back upon the projects of justice or beneficence. We still might not approve. But we do not condemn to the same extent.

II. THE CONCEPT AT WORK

I take it that the concept of victimization is now reasonably clear: It is a moral intuition with a certain internal structure and logic and a prominent place in ordinary moral life. But it is one thing to define a concept philosophically and another thing to show that the concept actually has some life in the law. Thus we transition now to that legal and legal-sociological analysis. The goal here is to demonstrate that the doctrine of criminal law and the practices of criminal institutions are systematically concerned with the phenomenon of victimization.

Some methodological remarks are necessary before we get started. With regard to doctrine, our aim is to engage interpretively with criminal codes in such a way as to bring to light one of their implicit normative commitments. It is necessary to engage with them interpretively because the codes are, after all, not

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72 There’s no reason a normative concept shouldn’t apply both to acts and to persons; there’s no line in the sand between virtue theory and everything else. The concept of being “irrational,” for example, can apply to both an act and a person.

73 See supra note 2 and accompanying text.

74 Id.
direct statements of moral principle. They are filled to the brim with moral ideas, but they consist in definitions of crimes and prescriptions of punishments. We want to work backwards to the ideas that make sense of those definitions and prescriptions, and so the challenge here is one of legislative interpretation, but legislative interpretation of a distinctive sort; it is a matter of normative interpretation. The question that immediately arises is: How are we to detect the concept of victimization in a criminal code? How are we to find it?

Now, there are different ways to approach this question, but the one I’ll be using is this: Imagine you were a legislator inclined to put the concept of victimization to work in a criminal code. What options would be available to you? There are three obvious ones. First, you could break ranks and name the concept explicitly, establishing as law that, given two otherwise identical crimes, the punishment is to be more severe as the “volume” on the victimization knob goes up or less severe as it goes down. But if you do not do that—and it would be unusual to be so morally self-conscious, and perhaps difficult or embarrassing to establish criminal law of such an atypical sort—you would have to take a more subtle approach. So, second, you could identify, expressly or by implication, a class of victims that is characteristically vulnerable or innocent and stiffen up penalties for crimes committed against that class. And third, you could identify victims who are characteristically aggressive or culpable and reduce penalties for crimes committed against them (and this you would almost certainly do by implication). The argument below is organized according to these three options. It is an argument of jabs and not knockout blows, but the overall picture that emerges is one strongly supportive of the concept of victimization.

With regard to practice, there is a different problem. Legislatures and judges leave behind a body of written material that lawyers are trained to interpret. But to study the output of police and juries—the institutional focal points here—we need the quantitative and qualitative techniques of social science; we need empirical studies of whether police and juries respond to the vulnerability or innocence of victims. And therein lies a problem. It is not that victims’ vulnerability and innocence are unmeasurable; one could investigate whether police and juries respond differently to crimes based on victims’ (not offenders’) criminal history, for example. And the problem is not a shortage of empirical studies as to how police and juries do their jobs; the literature there is considerable. The problem is that, victimization being a novel conceptual proposal, few if any of the existing empirical studies measure what a victimization theorist would take to be the relevant factors. If our quantitative studies are going to teach us the right lessons about the world, we have to know what to count, and knowing what to count is a conceptual matter. Thus crucial issues like victims’ criminal history often get passed over in favor of a small set of factors that are both easily counted and conventionally relevant—offenders’ criminal history, for example, or race, or socioeconomic status, or whatever else. Even in the rare cases in which the right factors are measured, they are often measured under the wrong conceptual headings (such as “victims’ social status”), and thus the studies typically don’t include the right controls or make exactly optimal distinctions. There is, in sum, a shortage of direct, on-point empirical
studies that could put the victimization concept—the victimization hypothesis in this context—to the test. It should also be said that, not being a social scientist, I’m not in a position to conduct those studies.

In light of these difficulties, my approach will be to try to synthesize some of the existing empirical work under a victimization heading. There are various second-best proxies for victimization that can nonetheless tell us something about what moves police and juries—for example, whether victims were very young or very old, whether they were involved with drugs or alcohol, whether they were members of gangs or otherwise criminally involved, and also whether they were men or women. The stereotype of women being more vulnerable and innocent than men is a problematic one, as discussed below, but the stereotype is also deeply ingrained, encoded in ideas of masculinity and femininity that continue to play a prominent role in society’s practices (especially where those practices are informal and unexamined). Where there are strong victim gender patterns in crime and punishment, it is reasonable to think those patterns are based on victimization thinking. The result of this sort of synthesis will be necessarily tentative, but it will provide suggestive evidence of the victimization thesis.

These empirical difficulties have a silver lining. The concept of victimization has the potential to spur new directions in empirical research. There are a variety of institutions connected to crime and punishment in America—not just police and juries but also prosecutors, the press, politicians, prison officials, and indeed criminal and prison populations themselves. In every case, there is room to investigate whether the group in question tends to make distinctions among crimes and criminals on the basis of the vulnerability or innocence of victims. I hope that the concept of victimization might spur future empirical work.

A. Doctrine

1. Naming the Concept in Doctrine

That there is anything in this category of “naming the concept in doctrine” should come as a surprise. It is of course possible for a legislature concerned with victimization to just write the concept into the criminal code and pass it into law. But to actually do so is an unusual move. American legislatures don’t often name as law the principles on which they act. We usually get rules, not principles, “Don’t kill” rather than “Life is precious,” “No stealing” rather than “Preserving private property is necessary for a stable society.” Working backwards to the principles is part of what the process of interpretation is all about. And usually we’ll need that process to discern the concept of victimization in our rules of criminal law. But there is a partial exception here: the “Vulnerable Victim” enhancement in the Federal Sentencing Guidelines.  

75 See infra Part III.B.

76 U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2009).
The enhancement started life in Title 18 as a special protection for elderly victims of telemarketing fraud, and had it stayed that way, it would have been part of the next analytic category in this paper—named classes of victims—instead of this one. But Congress then called on the U.S. Sentencing Commission to provide in the Guidelines “for substantially increased penalties” for violations of the provision, and mentions that in doing so, the Commission should “provide an additional appropriate sentencing enhancement for cases in which a large number of vulnerable victims” are targeted by telemarketers, “including but not limited to” elderly victims. Congress itself thus suggested that a broader concept lay behind the provision and itself used the term “vulnerable victims”; the Commission took the suggestion and the term and ran with them. The principle of the special penalty was obviously an objection to preying on the vulnerability of the elderly in the context of telemarketing fraud. So why stop at the elderly? And for that matter, why stop at telemarketing fraud? Thus the Commission wrote and Congress established the Vulnerable Victim enhancement, directing sentencing judges to increase an offender’s sentence by two levels in any case in which he or she “knew or should have known that a victim of the offense was a vulnerable victim”—meaning someone who is “unusually vulnerable due to age, physical or mental condition, or otherwise particularly susceptible to the criminal conduct.” The Commentary explains that a handicapped robbery victim or someone sold a fake cancer cure would qualify an offender for the enhancement, while a bank teller, whose exposure to crime stems “solely by virtue of the teller’s position in a bank,” would not. The Commentary also instructs that the enhancement is not to be applied where “the factor that makes the person a vulnerable victim” is already incorporated into an offense’s specific guideline provision, as when the guideline already enhances the penalty for the very old or very young.

We are missing the notion of innocence here, and we don’t have a diminution of penalties where the victims are unusually aggressive or culpable. But apart from that, this is a strikingly exact rendition of the victimization concept. The commentary in particular leaves no doubt (not that the main text left much) that vulnerability in the sense we have been using the term is the subject here. The addition of a mens rea term (“knew or should have known”) is interesting; it suggests that greater blameworthiness and not merely greater wrong or harm is the enhancement’s concern, that the focus is on the offender and not merely his deed. Also interesting is the exception that removes from the enhancement’s reach sentences that already take into account “the factor that makes the person a vulnerable victim”; this constitutes recognition of the fact that an implicit concern for vulnerability runs throughout the Guidelines already, in their many pre-

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78 Pub. L. 105-184, 6(b)(1), 6(c)(3).
79 U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2009).
80 U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 cmt. n.2 (2009).
81 Id.
existing provisions concerning victim age and disability and the like. But these are details. The remarkable thing here is that the Commission took something as specific as a special provision for the elderly in the context of telemarketing fraud and unfixed it from the elderly, from telemarketing, and from fraud, thus creating a free-floating penalty increase for all vulnerability victimization in all federal crime whatsoever. A sizable chunk of the concept of victimization here simply becomes law.

I like this example because it shows that there is at least something telling in the idea that criminal law exhibits concern for victimization. That idea might not be importantly and systematically true, as I’ve been trying to show, but it is at least not false.

2. Children, the Elderly, and the Disabled

I argued before that one option available to a legislature with victimization on its mind is to expressly identify certain classes of characteristically innocent or vulnerable victims and prescribe special penalties for crimes committed against members of those classes. I’d like to begin here with a simple point: Criminal codes are absolutely chock-full with express special penalties for crimes committed against children, the elderly, and the disabled.

What astonishes is the array of examples. We’ve already heard a few from federal law: Penalties go up under federal law for dealing drugs to a child, or committing telemarketing fraud against the elderly, or knowingly committing any crime against “vulnerable victims” (specifically including children, the elderly, and the disabled). Federal law also treats crimes in which a disabled victim was selected because of her disability as hate crimes, as do California, New York, and Texas—the three largest states in the country, and the three I’ll focus on here. But these are one-off examples; more striking is to work

84 U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2009).
86 CAL. PENAL §§ 422.6, 422.75; N.Y. PENAL § 485.05; TEX. PENAL § 12.47. In trying to generalize about American criminal law, one challenge is to manage the fact that we have at least fifty-one jurisdictions making law. There are those who say that one cannot speak of American criminal law at all under these circumstances, that there is no such thing. David Garland, for example, makes a suggestion to this effect in the capital punishment context. David Garland, The Peculiar Forms of American Capital Punishment, 74 SOCIAL RESEARCH 435, 437 (2007) (“America is not a single place for penological purposes, any more than is ‘Europe’ or ‘the West.’”). I think that view is too strong, but it is true that too big a sample of jurisdictions is burdensome and too small a sample unreliable. My approach here is simply to survey the law of the three largest American states, which also happen to be distinctive types of states in terms of geography, culture, and history.
systematically through a state’s crimes against the person looking for special reference to one or all of our three victim groups.

In Texas, for example, a murder becomes death penalty eligible if the victim is under age six.\textsuperscript{87} Unlawful restraint becomes a felony if the victim is under age seventeen.\textsuperscript{88} Assaults that are otherwise Class C misdemeanors become Class A misdemeanors where the victim is elderly or disabled.\textsuperscript{89} Apart from those assaults, but within the broad category of assault-based offenses, there is an entire special subdivision—essentially its own crime—devoted to causing injury to “a child, elderly individual, or disabled individual” and no other groups; more serious instances of the crime count as first- or second-degree felonies.\textsuperscript{90} Abandonment of children or leaving them in vehicles is specially criminalized.\textsuperscript{91} Of course there is the vast array of sex crimes involving children, including sexually based human trafficking (which becomes a felony of the first degree if the victim is under age eighteen, equivalent to human trafficking that results in the death of the person trafficked);\textsuperscript{92} continuous sexual abuse of a child (which in especially serious cases receives a harsher penalty than virtually any other crime except capital murder);\textsuperscript{93} indecency with a child;\textsuperscript{94} improper relationship between educator and student;\textsuperscript{95} and sexual assault upon a child,\textsuperscript{96} which becomes aggravated sexual assault if the child is younger than fourteen (and which also receives some of the harshest penalties in the criminal code).\textsuperscript{97} The special provisions governing sex have a good deal to say about the elderly and disabled as well—for example, it is sexual assault to have sex with someone with a serious mentally disability,\textsuperscript{98} and sexual assault becomes aggravated not only if the victim is under fourteen, but also if the victim is “an elderly individual or a disabled individual.”\textsuperscript{99} Now, there aren’t that many offenses against the person. There is in Texas no category within those offenses without special provisions for one or more of our three victim groups. The pattern continues if we look past the category of crimes against the person: Robbery, for example, becomes aggravated despite the offender not causing serious bodily injury, or indeed any

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  \item \textsuperscript{87} \textit{Tex. Penal} § 19.03(a)(8).
  \item \textsuperscript{88} \textit{Id.} § 20.02(c)(1).
  \item \textsuperscript{89} \textit{Id.} § 22.01(c)(1).
  \item \textsuperscript{90} \textit{Id.} § 22.04.
  \item \textsuperscript{91} \textit{Id.} §§ 22.041, 22.10.
  \item \textsuperscript{92} \textit{Id.} § 20A.02(b).
  \item \textsuperscript{93} \textit{Id.} § 21.02.
  \item \textsuperscript{94} \textit{Id.} § 21.11.
  \item \textsuperscript{95} \textit{Id.} § 21.12.
  \item \textsuperscript{96} \textit{Id.} §§ 22.011(a)(2).
  \item \textsuperscript{97} \textit{Id.} §§ 22.021(a)(1)(B), 22.021(a)(2)(B), 22.0.021(f).
  \item \textsuperscript{98} \textit{Id.} § 22.011(b)(4).
  \item \textsuperscript{99} \textit{Id.} § 22.021(a)(2)(c).
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bodily injury, if the victim is elderly or disabled and is placed in fear of bodily injury. Nor is this pattern a peculiarity of Texas. The trend might be even more pronounced in California, in fact.

What we are seeing here is a systematic assertion by our criminal law that it is worse to commit a crime against children, the elderly, or the disabled than it is to do precisely the same thing with precisely the same state of mind to an ordinarily situated adult. The assertion is so pronounced as to be counted among the features of American criminal law properly considered basic. And it should be seen as a puzzling feature of the law. Some might regard it as obvious that there is something worse about assaulting or kidnapping or killing a child than committing that same crime against an able-bodied adult, but that is a mistake: Just because something is intuitive doesn’t make it obvious. Why should committing the same prohibited act with the same prohibited mental state count differently in the moral scales because the victim is very young, or very old, or in a wheelchair? Two people are raped; one is an adult, the other a child. We feel there is a difference. According to our law, there is a difference. But what is the ground of the difference? I am aware of no existing conceptualization of it. Perhaps the most basic contention of this paper is that a phenomenon this pronounced calls for explanation.

Now, I think the victimization concept has obvious intuitive power in this context. If we imagine crimes in which children, for example, are beaten or raped or sexually exploited or otherwise exploited, and then hold up to introspective view the horror and outrage we feel in response (and remember, legislators writing criminal codes are imagining things in just this way), I would venture that a concern for innocence and vulnerability is what we’ll internally find. The concept has explanatory power here as well. An adequate explanation for the differential treatment afforded children, the elderly, and the disabled in criminal law should track some feature those three groups share in common (at least to the extent the law treats them in a common way, as it often does); which demarcates those groups from ordinary adults; and which attaches to something other than the crime’s basic actus reus and mens rea (as those might be shared by forms of the

100 Id. § 29.03(a)(3).

101 See, e.g., CAL. PENAL §§ 208(b) (raising the penalties for kidnapping where the victim is a child); 237(b) (raising the penalties for false imprisonment where the victim is elderly); 236.1(c) (raising the penalties for human trafficking where the victim is a child); 243.25 (raising the penalties for battery if the victim is elderly); 243.4(b) (raising the penalties for sexual battery if the victim is disabled).

102 For example, Judge Sandra Hamlin, in sentencing a priest who sexually abused young boys to the statutory maximum of ten years imprisonment, stated of the victims: “They were helpless. They were unprotected.” CNN.com, Feb. 21, 2001. See also Lawrence Lessig, Op-Ed: A Better Chance at Justice for Abuse Victims, N.Y. TIMES, April 27, 2010 (arguing that the Catholic Church has “work[ed] against the ‘weak and the vulnerable’” in connection to “child sexual abuse”).

103 Consider that special subdivision in the Texas law of assault devoted to these three groups together, and no others. See supra note 82 and accompanying text.
crime that do not occasion increased punishment). It’s difficult to imagine what that common feature might be if not a victim characteristic of some sort, and the obvious candidate is the way in which members of those three groups are unworldly or weak or diminished, mentally or physically, relative to ordinary adults. Really, when the law goes so far as to name three classes of victims obviously distinguished for their innocence and vulnerability and establishes a series of exceptional penalties for harming them, the concept of victimization is a very natural explanation. Perhaps the case is not as clear as the “Vulnerable Victim” enhancement discussed above, where the victimization concept was more or less directly established as law. But the interpretive gap here between phenomenon and explanation is not a large one.

Nonetheless, the argument thus far is only suggestive; there are contrary interpretations. And there is also a stronger case to be made for the interpretation I’m offering. So let’s zero in on the legislative scheme a little more closely. Within the variety of special criminal protections for our three victim groups, a large proportion have to do with child sex crimes. And within that body of law, surely the central place goes to the crime of having sex with a minor—statutory rape as it is often called for older children, child rape for younger ones (an informal distinction since, as a statutory matter, this is one crime separated by degrees). Child sex is the paradigmatic victimization crime, the first, most obvious, and most powerful example when we think of criminal law extending special protection to the vulnerable or innocent. It was for sex with young children that six state legislatures sought to extend the penalty of death beyond the crime of murder in the teeth of unfavorable Supreme Court precedent, and when the Supreme Court struck down those statutes as cruel and unusual, the controversy centered on innocence and vulnerability to a considerable degree. So let’s examine more closely the statutes governing this form of wrongful sex.

Now, there is a conventional story about why sex with children is criminal that does not give special weight to children’s innocence or vulnerability. The conventional story holds that the ordinary logic of rape is that it is sex without consent; children can’t consent; therefore sex with children constitutes rape.

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105 The dissenters, for example, argued that “in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity.” Id. at 2676-78. They also quote the claim (from an article tellingly titled, Murdering Innocence) that “[t]he immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped.” Id. (emphasis added).

106 See, e.g., LAFAVE, supra note 6, § 17.4(a), at 638-39 (“[S]ometimes nonconsent is conclusively presumed because of the victim’s age, as with what is commonly called ‘statutory rape.’”); SAMUEL H. PILLSBURY, HOW CRIMINAL LAW WORKS 14 (2009) (“In all jurisdictions, age sets one important limit on sexual consent. Any person under the jurisdiction’s legal age of consent is legally incapable of consenting to certain sexual acts . . . .”); ELLEN S. PODGOR ET AL., MASTERING CRIMINAL LAW 164-65 (2008) (“The rationale for the crime is that those under a specified age are incapable of making a reasoned decision to have sexual relations.”).
What is distinctive about children on this thought, what leads to their special legislative treatment, isn’t their innocence or vulnerability but their reduced agency. Yet this story, however reasonable in principle, does not hold up when one actually looks at the criminal codes. Consent alone cannot be driving the doctrine.

The California Penal Code, for example, defines rape as sex without consent, where the lack of consent is due to force, or intoxication, or threat, etc., and the punishment is 3 to 8 years.\(^{107}\) Now, if the usual theory of statutory and child rape were right, it would be easy to imagine the statute. It would simply include minority among the other factors that vitiate consent and prescribe the usual punishment: 3 to 8 years. But that is not how the statutory scheme works. In California, a minor for purposes of sexual consent is anyone under the age of 18.\(^{108}\) But sex with a minor over the age of 13 is actually subject to lesser penalties than ordinary sex without consent, and sex with someone 13 years old or younger is subject to far, far greater penalties than ordinary sex without consent. The California scheme is complex because it focuses substantially on the gap between the ages of offender and victim, but if you imagine a 40-year old offender—someone who would easily satisfy the various California gap requirements—sex with a 16- or 17-year old is either a misdemeanor or a minor felony at the court’s discretion.\(^{109}\) Sex with a 14- or 15-year old is again either a misdemeanor or a felony at the court’s discretion, and though a more serious felony if the court chooses that designation, still the 1 to 4 year prison term it earns is less than half the 3 to 8 years given for ordinary rape.\(^{110}\) It is only when the victim is 13 years old or younger that the crime actually moves into the category of seriousness that we find for ordinary rape, and then it speeds past that category into something more like murder: a sentence of 15 years to life.\(^{111}\) That is to say, not a single element of California’s punishment scheme for sex with a child makes sense on the model of ordinary sex without consent. Child sex is always either better or worse.

It is also more complex, for if we restate the California scheme without our simplifying device of a 40-year old offender, the rules are these: If the victim is under 18 and the offender is within three years of the victim’s age (think of a 19-year old with a 17-year old, for example), the crime is a misdemeanor.\(^{112}\) If the victim is under 18 but older than 13 and the offender is more than three years older (a 21-year old with a 17-year old, for example), the crime is either a misdemeanor or a minor felony at the court’s discretion.\(^{113}\) If the victim is 14 or

\(^{107}\) CAL. PENAL §§ 261, 264.

\(^{108}\) Id. § 261.5(a).

\(^{109}\) Id. § 261.5(c).

\(^{110}\) Id. § 261.5(d).

\(^{111}\) Id. § 269.

\(^{112}\) Id. § 261.5(b)

\(^{113}\) Id. § 261.5(c)
15 and the offender 21 or older, again the crime is either a misdemeanor or a felony at the court’s discretion, but with the more serious, 1 to 4 year sentence if the court does designate it a felony.¹¹⁴ And when the victim is 13-years old or younger and the offender at least 7 years older (think of a 20 year old with a 13 year old or worse), the sentence is 15 years to life.¹¹⁵ Again, nothing in this statutory scheme makes sense purely on a model of sex without consent.

This basic statutory structure holds in New York and Texas as well. There are always age gap requirements.¹¹⁶ Sex with a very young child is always far worse than ordinary rape.¹¹⁷ And sex with a mid-range teenager, in New York as in California (though in this case, not in Texas), is not as bad as ordinary rape.¹¹⁸ It is these three facts that the conventional story, focusing exclusively on consent, cannot explain. After all, if consent were the only issue, and if a 15- or 16-year old cannot consent, why should sex with them be treated any differently from other nonconsenting sex—from ordinary forcible rape? Perhaps consent theorists might try to stand their ground in these cases by proposing some notion of partial or impaired consent. But then, why should sex with very young children be treated differently from ordinary rape? It is surely true that very young children cannot consent to sex, but it is not as though they consent even less than the adult who is dragged kicking and screaming from a parking lot; both the adult and the young child do not consent at all—yet the penalties are different. And finally, if consent were the only issue, why should the gap between the ages of the offender and the victim matter—why should it matter whether the offender is 40 years old or just 18 himself? A 16-year old is equally incapable of consent either way. This is not to say that consent is irrelevant in explaining the criminality of child sex, but it is to say that consent is an insufficient explanation.

The concept of victimization can explain here what the concept of consent cannot. Begin with the very fact of drawing lines between victims of different ages where all of them are below the age of consent. That there are degrees of wrongness in this doctrinal area makes perfect sense on a victimization model because, as discussed above, victimization just is a degree-oriented concept: A person can be more or less vulnerable or innocent, and consequently more or less victimized. And of course, children are more innocent and vulnerable when they are younger.

The next question is the sharp line all three jurisdictions draw around age 13. There is a jump there in the doctrine; we see sudden, not step-wise, variation in the severity of wrongdoing and punishment. But of course, there is a jump there

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¹¹⁴ Id. § 261.5(d).
¹¹⁵ Id. § 269.
¹¹⁶ Tex. Penal §§ 22.011(a)(2), 22.011(c)(1), 22.021(a)(2)(B), 22.021(f); N.Y. Penal §§ 70(b)(ii), 130.05.3(a), 130.25-.50, 130.96.
¹¹⁷ Id.
¹¹⁸ Id.
in terms of human development too. The line that the law is drawing is the line demarcating adolescence. On one side of that line is genuine childhood, on the other, the liminal space between childhood and adulthood; with the first, a stage of development that is at least relatively and presumptively presexual, with the second, a stage of development that we expect to be one of sexual awakening.\textsuperscript{119} There are vulnerability elements in this jump, but even more, there is a great leap in terms of the loss of innocence. With adolescents, we want the passage from presexuality to sexuality to be a healthy one, and we worry that the transition might be distorted by some bad experience, some manipulation by an older person. With genuine children, we don’t want that passage to occur yet at all, and we react to its occurrence as if something has been not just distorted but somehow lost or destroyed. This difference also affects how we look at the offender. A 40-year old man who is attracted to 16- or 17-year old girls had better watch himself, but is not deviant in the sense of feeling sexual to a kind of person that is not supposed to have a sexual presence. A 40-year old man who is attracted to 8-year old girls is deviant in that sense, precisely because he feels sexual to a kind of person that is not supposed to arouse sexual feelings.

Finally, what about the law’s insistence on an age gap between offender and victim? Here, the key is victimization’s relational character, its yoking together of wronged and wrongdoer in a moral relationship “like the opposing poles of an electrical apparatus . . . an arc of normative current [] passing between.”\textsuperscript{120} Where there is victimization, there must not only be one person in a position of vulnerability or innocence, but also another in a position of relative power and worldliness; there must be a preying-upon. And there is no preying-upon without an age gap. If two 7-year olds have sex, we might think something has gone wrong socially, but we wouldn’t ordinarily think of the problem as one of predation (or the logic would be that each preyed upon the other!). On the other hand, there is predation when a 40-year old has sex with a 7-year old. The difference in the two cases turns neither on the age of the victim alone nor on the age of the offender alone, but on the relationship between those two ages. Age gap requirements are necessarily relational, insisting on certain relative positions between wrongdoer and wronged—just as the logic of victimization would suggest.

In sum, I would propose that we understand the wrong at issue in child sex, not chiefly as non-consensual sex, but as predatory sex—as preying sexually upon vulnerability or innocence. For what we see in this area of doctrine is a complex arrangement of both relational and absolute age requirements that cannot

\textsuperscript{119} There is controversy among historians and anthropologists regarding the degree to which the concepts of childhood and adolescence are biological or culturally constructed, and among psychologists regarding the degree to which early childhood really is presexual. See, e.g., PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., Vintage 1962) (1960); SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (James Strachey trans., 2000) (1905). I don’t mean to take a stand in those controversies. It is enough for me that certain understandings are conventional in our culture and reflected in our law.

\textsuperscript{120} See supra note 46, at 335.
be explained on the basis of consent alone. Victims must be below some ceiling—18 in California, 17 in Texas and New York—to be subject to predation on account of their innocence or vulnerability; this is the so-called “age of consent” and it turns on the victim alone. Offenders must of course be above some floor to be criminally responsible at all; this concerns familiar norms regarding child offenders (rather than child victims) and it turns on the offender alone. But provided those absolute requirements are satisfied, we begin a complex bipolar dance where criminal wrongdoing generally requires age gaps, shifting as the gaps shrink or grow and as certain threshold ages on either side are passed. The numbers in all three jurisdictions are constantly in motion, and the logic of it will elude any analysis in terms of offender or victim alone. But the patterns are perfectly logical; the numbers are moving in tandem, tracing out the concept of victimization with such clarity of focus that it is startling to see. I have not cast this analysis in terms of legislative intent; the interest has been in the normative logic of the law, not the psychological motivations of the lawmakers. But in this case, the victimization concept is written into the law so precisely that I find it hard not to believe that the legislatures had the concept in mind—whether consciously or unconsciously or semi-consciously. The normative logic of the law seems too strong to be explained in any other way.

3. Combatants and Adulterers

The concept of victimization is symmetrical: It not only extends concern to the vulnerable or innocent but also, as discussed above, withdraws it from the aggressive or culpable. This feature of the philosophical idea is also at work in legal doctrine. We’ve been examining the first half of the equation—enhanced punishments for crimes committed against the vulnerable or innocent. Let’s turn now to the second half, that is, to reduced protections and penalties for those whose victims have themselves transgressed.

Now, this is an uncomfortable business for legislatures. Without running directly afoul of our sense of equality, they can safely and explicitly protect children and the elderly and disabled, but it’s easier to be selectively harsh for certain victim classes than to be selectively forgiving, and it would be awkward indeed for a legislature to declare in a penal code that robbery or rape are to be downgraded to misdemeanors when the victims are drug-dealers or prostitutes. That sort of downgrading tends to show up in the practice of criminal law rather than the doctrine (as discussed at length below), and to the extent there are

121 Others have focused on legislative intent, typically from a historical standpoint, and have come to similar conclusions. See, e.g., Gerald Leonard, Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstonian to the Model Penal Code, 6 BUFFALO CRIM. L. REV. 691, 778-79 (2004).

122 See supra note 29 and accompanying text.

123 See infra Part II.B.
exceptions, they tend to be subtle and ambiguous. But there is a great exception: the doctrine of provocation in homicide, or what most states call “voluntary manslaughter.”

Voluntary manslaughter in American law today is a moving target, caught between the competing rationales and doctrinal formulations of the common law and the Model Penal Code. The common law version still makes up the core of the doctrine in the vast majority of states. “The traditional common law formulation . . . defines voluntary manslaughter as a killing that is committed in the ‘heat of passion’ produced by an ‘adequate provocation,’ and that occurs without sufficient ‘cooling time.’” Essential to the common law conception is that the victim must be the source of the provocation; the offender cannot benefit from the doctrine if she lashes out at some third party. Even more essential, the provocation is legally adequate only where it falls into certain categories—namely, the “‘nineteenth century four’” of “adultery, mutual combat, false arrest, and a violent assault.” And most important of all, the claim is not a complete defense. It mitigates the charge and penalty, but it does not exculpate—unlike, say, a successful claim of self-defense. Part of the puzzle in this area of law is explaining why a provoked killing should be less wrongful than an unprovoked one without thereby becoming non-wrongful.

The elements of this doctrine make sense on a victimization model. To begin with, each of the categories of adequate provocation, of the “‘nineteenth century four,’” turns on some transgression on the part of the victim. The two great

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124 When California declares that it is a crime to entice an “unmarried female, of previous chaste character, under the age of 18 years,” into “illicit carnal connection,” for example, it is not clear whether to interpret the provision as extending special concern to a special class of putative innocents (the “chaste”) or as removing it from another class of putative non-innocents (the unchaste). CAL. PENAL § 266.


126 Depending on how one counts, roughly ten states currently make use of the Model Penal Code’s version of the doctrine, in whole or in part. See infra note 138 and accompanying text.

127 Kahan & Nussbaum, supra note 125, at 305.

128 Id. at 306.

129 Nourse, supra note 125, at 1341.

130 Kahan & Nussbaum, supra note 125, at 312-13.

131 Ashworth argues that what links the four together is the “unlawfulness” in the victim-provoker’s conduct. A.J. Ashworth, The Doctrine of Provocation, 35 CAMBRIDGE L.J. 292, 293-94. Horder responds that the link is more specific than that, turning on the kinds of transgression regarded as most grave under the “early modern concept of honor.” JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 25 (1992). It is an interesting disagreement, but for my purposes, both views track victim wrongdoing; that is enough. Note, however, that not everyone
images in this body of law—the cheating spouse caught in the very act and the barroom brawl—are images of culpability and aggression, the one a betrayal, the other mutual combat. Furthermore, if it is the victim’s transgression that mitigates the wrong of the killing, as a victimization model would hold, it makes sense that voluntary manslaughter is only available to those who kill the wrongdoer, and not some third party—for the third party is not culpable, however understandably enraged the offender might be. And finally, the partial character of the defense also fits, since victimization is itself a more-or-less phenomenon, one that typically intensifies or reduces wrongfulness rather than creating or eliminating it.

More difficult to explain via the concept of victimization are the related requirements that the crime be undertaken in the “heat of passion” and without a “cooling off.” Now, the early history of the doctrine did not or did not clearly require passionate action; provocation was justification, full stop. But it is indubitably true that, fairly early in the doctrine’s development, passion became required, and it is also true that, on a victimization model, wrongfulness is reduced even for dispassionate action (think of Omar robbing the drug dealers, for example). My view here is simply that voluntary manslaughter under the common law is a hybrid: On the one hand, there must be victim aggression or culpability, and on the other, there must be a sudden, passionate response. The first is the concept of victimization at work; the second is something else—perhaps mercy for a reasonable loss of self-control (as Hart would have it), or an evaluatively laden judgment of virtuous emotion (as Kahan and Nussbaum argue). There is a major scholarly and practical dispute over how best to understand the passionate elements of voluntary manslaughter, but I am not invested in that dispute so long as the element of passion does not push aside the element of victim transgression. The concept of victimization is a necessary part of explaining the common law doctrine of voluntary manslaughter; it does not have to be a sufficient explanation of the doctrine as well.

The Model Penal Code reformulation of the doctrine, however, largely does away with the victim transgression element of that hybrid, making voluntary manslaughter available for any killing “committed under the influence of extreme mental or emotional disturbance,” provided there is a “reasonable explanation or excuse” for the disturbance, where reasonableness is to be judged “from the viewpoint of a person in the actor’s situation under the circumstances as he

agrees with the “victim wrongdoing” interpretation of the common law doctrine. George P. Fletcher, Rethinking Criminal Law 245 (2000) (“[T]he fact that it is the victim who typically strikes the accused before he is killed can mislead one to think that the rationale for provocation is the victim’s contribution to his own death.”).


133 H.L.A. Hart, Punishment and Responsibility 33 (1968) (arguing as a matter of “common sense” and “human nature” that men are “capable of self-control when confronted with an open till but not when confronted with a wife in adultery”).

134 Kahan & Nussbaum, supra note 125, at 314-18.
believes them to be."\textsuperscript{135} This is a psychologization of the doctrine, focusing on the capacity of extraordinary situations to deprive ordinary people of self-control,\textsuperscript{136} and it leads to doctrine under which the offender can get the benefit of voluntary manslaughter where she was not provoked by a wrong, or did not confine her response to the wrongdoer, or both.\textsuperscript{137} Insofar as doctrine takes this path, it becomes wholly a defense of excuse rather than justification, and the concept of victimization is not an important part of its explanation.

But what is most notable about the MPC version of voluntary manslaughter is how few states have taken its path: Of the fourteen to try it, four “returned to common law formulations after a brief experience with the Model Penal Code.”\textsuperscript{138} As Kahan and Nussbaum remark: “The career of the Model Penal Code formulation has not been a particularly happy one. . . . Consumers of legal doctrine, at least, clearly prefer the evaluative position of the common law.”\textsuperscript{139} Furthermore, even in the states that have gone the MPC route, an empirical examination of the voluntary manslaughter claims that reach juries show that victim wrongdoing has resurfaced in the doctrine at work.\textsuperscript{140} Even under the MPC formulation, an extreme emotional disturbance must be at least subjectively “reasonable.” On that basis, judges have barred claims from reaching juries where grounded in mere insults from friends or employers, and permitted claims to reach juries where grounded in situations of combat (as always) and for offenses that occur within intimate relationships (as always too). Nourse speaks to the intimate side of that equation: “In the end, our judgments about ‘passion’ turn on the equities of intimacy and loyalty. Defendants regularly portray their partners as the wrongdoers in the relationship, as the cheaters who heartlessly left.”\textsuperscript{141} That is not to say that nothing has changed with the MPC. In those states that have taken an MPC approach, a broader, less evaluatively constrained set of claims make it to juries than once did under the common law. But the victimization elements of the doctrine have not been wholly eliminated even in the relatively few states that have gone in the MPC’s direction.

In fact, the most striking evidence of the victimization concept’s power in this body of law is its stickiness in those states that have gone partly down the MPC’s path. In Texas, for example, the legislature recently struck its voluntary manslaughter provision altogether while adding a clause to its murder statute.

\textsuperscript{135} Model Penal Code § 210.3(1)(b) (1980).
\textsuperscript{136} Id. § 210.3 cmt. 5(a), at 55-56.
\textsuperscript{137} Id. at 61.
\textsuperscript{139} Kahan & Nussbaum, supra note 125, at 323.
\textsuperscript{140} See generally Nourse, supra note 125.
\textsuperscript{141} Id. at 1379. Likewise, Fletcher argues that, whether on a common law or MPC version of the doctrine, “the underlying normative issue [is] whether the accused may be fairly expected to control an impulse to kill under the circumstances.” Supra note 131, at 246-47.
allowing a defendant to argue, at the punishment stage of a trial, that “he caused the death under the immediate influence of sudden passion arising from an adequate cause.” But if one then checks the definition of “sudden passion,” one sees that it must be passion “arising out of provocation by the individual killed”—the old victim transgression requirement, here in a slick new MPC context. California’s voluntary manslaughter statute requires only “unlawful killing . . . upon a sudden quarrel or heat of passion.” That too has an MPC ring to it, and California is ordinarily classified as a “mixed” MPC/common law state on this issue. But California’s courts have required provocation nonetheless, and required it of the victim. Voluntary manslaughter in America, despite the MPC, by and large still follows the logic of victimization.

B. Practice

1. Police

We turn now from doctrine to practice, and specifically to the practices of police—both departments and individual officers. My argument here is a simple one. It is of course the case that police operate within the constraints of scarce resources and therefore cannot give unlimited attention to every case. They therefore rank crimes; they prioritize. Homicides outrank petty theft, bank robberies outrank ordinary robberies, assaults that cause serious injury outrank assaults that cause minor injury, and so on. The principles at work in these judgments are sometimes established by policy and sometimes intuitive and implicit; a general understanding of the importance of the right violated, the magnitude of the violation, the social cost of the type of crime in question, and other such considerations are all in play. My claim here is that one of the important prioritization principles, especially within a fixed category of crime, is victimization. I’ll make both a qualitative and a quantitative argument for this thesis, focusing on within-category prioritizations of homicide.

First—as David Simon’s in-depth, journalistic study of the Baltimore Police Department shows— not all homicides are created equal. As Simon puts it, the homicide detective labors in anonymity “over some bludgeoned prostitute or shot-
to-shit narcotics trafficker until one day the phone bleats twice and the body on
the ground is that of an eleven-year-old girl, an all-city athlete, a retired priest, or
some out-of-state tourist who wandered into the projects with a Nikon around his
neck. Red balls. Murders that matter.\(^{148}\) One could hardly make the point more
forcefully than that. The very existence of the term “red balls,” semi-official
police slang in Baltimore for a murder of extraordinary importance, demonstrates
that, even among homicides, distinctions of priority are an ordinary operating
assumption.\(^{149}\) Simon also shows that what it means functionally for a case to be a
red ball is that the police devote disproportionate resources to it. As Simon
writes: “Majors, colonels and deputy commissioners who never uttered a word
when bodies were falling all over Lexington Terrace in the summer drug war of
‘86 are now leaning over the shoulder of a detective sergeant, checking the fine
print.”\(^{150}\) The policy—and it is policy—in such cases is: all hands on deck. “[A] red ball by
definition requires every warm body.”\(^{151}\)

So what makes a homicide a red ball? Simon’s examples can be sorted into
three categories: child murders,\(^{152}\) police-involved shootings,\(^{153}\) and murders that
threaten tourism.\(^{154}\) The second of those is likely based on concerns for self-
interest and legitimacy; the third, though it may have some victimization
elements, probably has stronger economic ones. (I don’t claim that victimization
is the only prioritization principle that matters.) But the first turns on
victimization. Indeed, the “classic red ball,” the case that becomes the structural
spine of Simon’s book, was the murder of an eleven-year old, African-American
girl who was raped and killed on her way home from school—Latonya Wallace.\(^{155}\)
The case commanded “the attention of the entire department,” arousing
extraordinary passion and energy. “You can tell a little girl got killed today,” says
one detective, “because it’s eight P.M. and the entire police department doesn’t
want to go home.”\(^{156}\) Indeed, the case spurred that kind of reaction not only in the
police but even in the criminal community: When the police questioned the
gangsters and drug-dealers in Latonya Wallace’s neighborhood, “[f]or one
February evening the code of the street is abandoned and the dealers and dopers

\(^{148}\) SIMON, supra note 147, at 20.

\(^{149}\) The term derives from the homicide unit’s custom of tracking cases by writing victims’
names in red marker on a whiteboard in the squad room, with an open red dot beside the name
until the case is solved, at which point the name is re-written in black. (I particularly like that it is
the victim’s name that is used to track the crime, as opposed to, say, the assigned detective’s name,
or the location, or whatever else.)

\(^{150}\) SIMON, supra note 147, at 20.

\(^{151}\) Id. at 391; see also id. at 21.

\(^{152}\) Id. at 435.

\(^{153}\) See, e.g., id. at 391.

\(^{154}\) See, e.g., id. at 20.

\(^{155}\) Id. at 69.

\(^{156}\) Id. at 70.
readily offer up to the police whatever information they have.\textsuperscript{157} Homicides in that community were not uncommon; even homicide-rapes were not shocking; but the rape and murder of a child was shocking and everyone—police, criminals, and community alike—recognized that there was something different about it.

Simon also tells us a lot about what makes a murder not a red ball, and the logic here too is a victimization logic:

There is the thirty-nine-year old Highlandtown native who goes with a friend to buy PCP in a blighted section of Southeast Washington, where he is instead robbed and shot in the head by a street dealer. . . . There is the argument at a West Baltimore bar that begins with words, then escalates to fists and baseball bats until a thirty-eight-year old man is lingering in a hospital bed, where three weeks later he rolls the Big Seven. . . . And the young drug dealer from the Lafayette Courts projects who is abducted and shot by a competitor . . . . And the twenty-five-year-old East Baltimore entrepreneur who is shot in the back of the head as he weighs and dilutes heroin at a kitchen table. And the is-this-a-great-city-or-what homicide that Fred Ceruti handles in a Cathedral Street apartment, where one prostitute plunges a knife into the chest of another for a $10 cap of heroin . . . .\textsuperscript{158}

Simon indicates pretty clearly that most homicides are of this variety, with the victims themselves engaging in some criminality, taking risks, participating in what in Baltimore slang is called “the game.” It is only “rare victims for whom death is not the inevitable consequence of a long-running domestic feud or a stunted pharmaceutical career.”\textsuperscript{159}

Simon is not alone in describing, and Baltimore is not alone in displaying, this victimization logic. In Southern California, police vernacular for the murder of drug-dealers, gangsters, prostitutes, and other law-breakers is “NHI”—“no humans involved.”\textsuperscript{160} And at least two other crime journalists who have taken sabbaticals to spend time with the police—Michael Gelman with the New York homicide squad and Robert Blau with the Chicago homicide squad—offer accounts consistent with Simon’s.\textsuperscript{161} We see again in both the pattern of ranking and differential distribution of resources. We see again the slang for murders that matter (apparently “red balls” are called “heaters” in Chicago). And we see again the logic of victimization in selecting which murders matter. As Christopher

\textsuperscript{157} \textit{Id.} It would be interesting to investigate whether the concept of victimization is generally at work in the criminal community—that is, whether committed criminals and prisoners distinguish between those within their numbers who prey upon the vulnerable or innocent and those who do not. The well-known antipathy to child sex offenders in prisons suggests that they might.

\textsuperscript{158} \textit{Id.} at 170-71.

\textsuperscript{159} \textit{Id.} at 171-72.

\textsuperscript{160} David A. Klinger, \textit{Negotiating Order in Patrol Work}, 35 CRIMINOLOGY 277, 291 n.7 (1997).

Wilson summarizes the pair (focusing on media coverage): “Blau and Gelman come to recognize that the status of the victim often dictates the amount of coverage given a violent crime. . . . [N]ews stories with ‘legs’ (Blau 159) or ‘wings’ (Gelman 60) are stories with white, white female, upper-class, or ‘innocent’ (mainly young) victims. By contrast, stories of minority gang members with long police records start to seem less newsworthy.”

Now for the quantitative case—really, quantitative case-lite, because as I remark above, the quantitative studies in this area, lacking the concept of victimization, are ill-designed to test it. There is a literature on how police allocate scarce resources in the context of crime clearance rates. The literature, which focuses mainly on homicides, is organized around two theoretical models. The first model stresses victim characteristics, arguing that police will devote more effort and attention to certain classes of victims than others. So far, so good from a victimization perspective, but then this model goes exactly wrong, arguing that high social status will tend to motivate greater police effort and low social status lesser police effort—and thus predicting that white, middle-aged, socioeconomically secure male victims will receive the most police attention, and children, the elderly, and women, as well as racial minorities, the least. There is no theoretical model in the literature that focuses on victim characteristics but proposes that child, elderly, or female victims might motivate more police effort. The competing model instead holds that “strong organizational and public pressure to clear homicides” lead police to “respond to all homicide cases with maximum willingness and effort regardless of victim characteristics.” Thus this model focuses on investigative characteristics (e.g., the location of the crime, whether witnesses are available, whether a weapon was used, etc.), arguing that good physical evidence rather than police effort and attention will predict crime clearance rates.

One can already see what is coming, at least if the victimization concept is right. Empirical studies will not confirm the first model’s predictions, and this will be taken in the field as support for the second model, even though the second model’s central claim—that all homicide cases spur maximum (and therefore equal) effort on the part of police—is totally belied by the qualitative studies


163 See supra pp. 25-27.


166 Id. at 83.

we’ve just reviewed. And so it goes. Empirical studies indicate that homicides involving child victims are more likely to be cleared. Homicides in which the victim had no criminal record are more likely to be cleared. Homicides in which the victim was a drug user or buyer are less likely to be cleared. Interestingly, homicides involving non-white victims are also either more or equally likely to be cleared as cases involving white victims, though there is at least one dissenting study. Stepping outside the homicide context for a moment, both robberies and assaults are more likely to be cleared where victims are female. In the criminology subfield in which these studies take place, researchers do indeed take these findings as support for the second, “investigative characteristics” theoretical model (which after all can’t be wholly false—of course good witnesses and good physical evidence help clear

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168 Wendy C. Regoeczi et al., Clearing Murders: Is It About Time?, 45 J. of Research in Crime & Delinquency 142, 144, 156 (2008) ("One of the more consistent findings in the literature on homicide clearances is the high likelihood of clearing cases involving child victims..."; see also Marc Riedel, Homicide Arrest Clearances: A Review of the Literature, 2 Sociology Compass 1145 (2008). Note, however, that cases involving child victims are often easier to solve for situational reasons as well as police effort reasons; for example, children are often killed by someone known to them.


170 Id. But see Roberts, supra note 165, at 87 (finding that cases with victims involved in drugs or gangs are more likely to be cleared).

171 See Regoeczi, supra note 168, at 153, 156; Roberts, supra note 165, at 84, 87; Wendy C. Regoeczi et al., Uncleared Homicide: A Canada/United States Comparison, 4 Homicide Studies 135 (2000). Note, however, that as with children, women are more likely than men to be killed by a family member, so the cases sometimes more readily present suspects.


173 See Regoeczi, supra note 168, at 155; Roberts, supra note 165, at 84; Regoeczi, supra note 171.

174 See Litwin & Xu, supra note 172.

cases). But the evidence actually fits a victimization thesis better, and when taken together with qualitative studies like Simon’s, much better.

One last body of literature is worth noting in closing: the body of theoretical and empirical material—“lifestyle/routine activities theory,” “culture-of-violence theory,” “self-control theory” and the like—on the similarities between offenders and victims. One of that literature’s dramatic (and empirically supported) moves is to divvy violence-involved individuals into three groups: offenders, victims, and “victim-offenders.” The second group, victims, “report no prior involvement in offending” and become criminal victims through “routine activities that place them in close proximity to potentially violent environments.” The third group, “victim-offenders,” do report “past involvement in offending”; are “more likely to be male”; and become victims in connection with “their prior criminal involvement and alcohol and drug use.” In homicide cases, for example, it is in fact the rare victim whose hands are completely clean. In Baltimore, on one report, the average homicide offender has been arrested eleven times, the average homicide victim, ten times. One New Mexico study shows that 49.5% of all homicide victims have an arrest history, as against 57% of offenders. And when offenders’ motives are studied, approximately 52% of homicides prove to be motivated by argument; 35% to be drug-related; 25% to be based on retaliation; and 13% to be gang-related. (Note that a homicide can have more than one motive, so the numbers don’t total to 100%.) The basic picture one gets from Simon, the picture of a police routine in which homicide detectives labor most days “over some bludgeoned prostitute or shot-to-shit narcotics trafficker until one day the phone bleats twice” and

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177 There is one important exception: Homicides involving elderly victims are apparently less likely to be cleared than cases for other age groups. See Regoecci, supra note 168, at 144, 153.


179 Broidy, supra note 178.

180 *Id.*

181 Adrienne Frank, *Homicide: 33 Years on Baltimore’s Streets*, AMERICAN SUMMER 23, 26 (profiling McLarney). Note that the statistic is not clearly attributed. It also sounds a little high.

182 Broidy, supra note 178.


184 See Simon, supra note 148, and accompanying text.
something unusual has happened—someone innocent has been killed—is supported.

2. Capital Juries

Part of my argument throughout this paper has been that the concept of victimization is an element of ordinary moral thought that has found its way into criminal law. Capital juries are a uniquely valuable testing ground for that proposition. Like all juries, the capital jury injects a lay element into the law’s doctrinal system and institutional professionalization. But unlike most juries, the capital jury cannot even by the thinnest of fictions be said to confront a factual question. The question it confronts is a moral one; the defendant’s guilt is settled, and all that remains is to determine desert. Thus capital juries are an agent of ordinary moral thought in criminal law and an important test of my victimization claim. The question here is simple and empirical: Are capital juries more likely to give verdicts of death when an offender’s crime features a high degree of victimization?

Now, the basic issue here—what moves capital juries to choose death—has been extensively studied. Yet as I’ve indicated, rarely are the right questions asked from a victimization standpoint. Important questions would be whether death penalty verdicts correlate with victims’ criminal histories; victims’ age; victims’ gender; victims’ activities immediately before being killed; and victims’ physical position when killed (e.g., lying prone as in a coup de grace), among other things. The study that might test my hypothesis directly has not yet been conducted. But at least one related study has been conducted: Scott Sundby’s The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims. Sundby’s question was whether capital jurors “make distinctions between ‘worthy’ and ‘unworthy’ victims in deciding whether to impose a death sentence.”

Focused on California (where he was the Capital Jury Project’s Principal Investigator), he examined this question on the basis of questionnaires and in-depth interviews with jurors from thirty-seven cases that had split roughly 50/50 between sentences of death and sentences of life without parole. In the vast literature on capital punishment, this article is in my view a singularly important contribution.

When asked how accurately the terms “innocent” or “helpless” describe the victim of the crime under consideration, 86% of the jurors who voted for death

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185 See supra pp. 27-29.
186 At least some of the data exists, however. I have requested it from the Capital Jury Project.
188 Id. at 345.
189 Id. at n.6.
answered “very well” and 91% answered either “very well” or “fairly well.”\textsuperscript{190} Of the jurors who voted for life imprisonment, only 46% said the terms describe the victim “very well,” and only 62% said the terms describe the victim either “very well” or “fairly well.”\textsuperscript{191} When asked how accurately the terms “admired or respected in the community” describe the victim, 61% of the death jurors said very well or fairly well, versus 34% of the life jurors.\textsuperscript{192} That basic pattern held when the questions were turned around to focus on victim culpability. When asked whether the victim was “too careless or reckless,” 11% of the death jurors answered yes, while 51% of the life jurors answered yes.\textsuperscript{193} Indeed, 71% of the death jurors said the victim was “not at all” careless or reckless, versus only 33% of the life jurors.\textsuperscript{194} As to whether the victim “had a problem with drugs or alcohol,” 23% of the death jurors said yes versus 50% of the life jurors.\textsuperscript{195} As to whether the victim had an “unstable or disturbed personality,” 7% of the death jurors said yes versus 38% of the life jurors.\textsuperscript{196} Asked whether the victim was a “loner without many friends,” 8% of the death jurors said yes (though none agreed with the description “strongly”) versus 33% of the life jurors.\textsuperscript{197} And when asked whether the victim’s “role or responsibility in the crime” consumed either “a great deal” or “a fair amount” of deliberation time, 29% of death jurors said yes versus 53% of death jurors.\textsuperscript{198}

Even more telling are Sundby’s findings, not about what jurors said about themselves in responding to questionnaires, but about what they did in issuing verdicts. In cases involving random victims, which Sundby defines as cases in which the victim “played no role in bringing about the crime,” ten resulted in death sentences and one in a life sentence (as well as one in a hung jury).\textsuperscript{199} In cases involving nonrandom victims, nine resulted in a death sentence and sixteen in a life sentence.\textsuperscript{200} If that “nonrandom” category is broken down further into a

\begin{itemize}
  \item [\textsuperscript{190}] Id. at 378, tbl. 4.
  \item [\textsuperscript{191}] Id.
  \item [\textsuperscript{192}] Id. at 379, tbl. 8.
  \item [\textsuperscript{193}] Id. at 379, tbl. 9.
  \item [\textsuperscript{194}] Id.
  \item [\textsuperscript{195}] Id. at 378, tbl. 6.
  \item [\textsuperscript{196}] Id. at 378, tbl. 5.
  \item [\textsuperscript{197}] Id. at 379, tbl. 7.
  \item [\textsuperscript{198}] Id. at 378, tbl. 3. This last statistic is quite telling, I think, but also ambiguous. It makes sense that a jury would discuss the victim’s role or responsibility in the crime if that role or responsibility were considerable and thought to affect the moral calculus. Unfortunately, it also makes sense that a jury would discuss the victim’s role or responsibility if he or she lacked any role or responsibility and that fact was thought to affect the moral calculus. Now, probably the discussion in that latter case would be more brief, and it seems a little less likely to occur at all—if the victim were in no way responsible, the issue might never arise. Nonetheless, the statistic, though helpful, is probably less helpful than it should be.
  \item [\textsuperscript{199}] Id. at 356.
  \item [\textsuperscript{200}] Id.
\end{itemize}
subcategory of victims who were “risk-taking/antisocial” (e.g., a gang member) and a subcategory who were “non-risk-taking” (e.g., a fellow employee at work), we find that the juries gave more than twice as many life as death sentences (eleven to five) for the culpable non-random victim, and roughly even numbers of life and death sentences (five to four) for non-culpable non-random victims. Jurors were also more likely to give a death sentence for female victims (58% of those cases resulted in a death sentence, versus 48% for male victims), a married victim (85% versus 33%), and a parent (60% versus 27%)—numbers which become more dramatic when the categories are again sorted by “risk-taking” versus “non-risk-taking” victims. For example, among parents who were non-risk-taking victims, 83% of the cases resulted in death sentences, versus 25% for parents who were risk-taking victims. As Sundby summarizes the picture, “jurors may not care in the abstract whether a victim was a banker or a welfare recipient. They do care, however, if the banker was murdered while cruising a seedy adult bookstore late at night instead of during a robbery while honorably carrying out his duties at the bank.”

These are dramatic effects—actually, they are the most dramatic I am aware of in the death penalty literature—and, needless to say, they are perfectly supportive of the victimization hypothesis. But Sundby also makes a powerful qualitative case for the hypothesis—though he in fact is focused on jurors’ sense of identification with victims and intends to make a somewhat different (though related) case of his own. A quotation from one of the jurors faced with a random victim makes both Sundby’s point and, even more powerfully, mine: “‘She was just innocent. She happened to be in the wrong place at the wrong time. . . . I mean, they surprised her in her bedroom at gunpoint and executed her.’” Jurors confronted by such victims would routinely describe them as being in the “‘wrong place at the wrong time,’” or as “‘just minding her own business,’” or as a “‘typical school teacher,’” “‘average teenager,’” “‘anyone’s daughter,’” “‘regular working guy.’” One juror described the victim as an “‘elderly woman,’” murdered “‘with what they call the coup de grace,’” emphasizing “‘the vulnerability of this woman.’” Another stated directly that he gave a death penalty verdict because the victim was a “‘regular’ guy: ‘It could have been anybody, so there’s an outrage to it.’” A third emphasized that, although the murder wasn’t “‘bloody,’” it was horrible because the victim was an “‘innocent

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201 Id. at 357.
202 Id. at 357-58.
203 Id. at 358.
204 Id.
205 Id. at 359.
206 Id. at 360-61.
207 Id. at 361.
208 Id.
bystander.”

A fourth stressed that the victim was “‘a careful man.’” Perhaps the juror who said it best put it this way: “‘He had her life in his hands. At that point, she was a total victim, standing there naked in the cold.’”

Turning to jurors interviewed about non-random victims, one remarked: “‘I wouldn’t say she was an innocent victim, because, well, what was she doing in the biker bar?’” Another said: “‘They were all dope fiends . . . . [The victim] reminded me of people who get so screwed up that something bad was bound to happen to them . . . .’” One juror commented that he “‘didn’t approve of [the victim’s] actions, because she put herself in danger.’” Faced with a drug-dealer who killed a rival, one juror commented: “‘Everybody came to the conclusion that nobody felt threatened by him as long as they were not a competitor in selling drugs or not a threat to him—either a business threat or a physical threat. They felt he was probably the kind of guy you can have over, have dinner with, discuss politics, whatever.’” A number of jurors, faced with a victim who had been extremely abusive toward the boyfriend who killed her, explained their life sentence by commenting that she was “‘extremely cruel,’” “‘used people, aggressive, abusive,’” and “‘deserved what she got.’” One juror in a different case explained her choice for a life sentence in this way: “‘I thought about a scale . . . serial murder involving children or women as the worst. I don’t know why that seems to me—children in particular and, unfairly, women before men. Well, when I compared this crime . . . even though it was a terrible crime, it didn’t really compare with the worst I could imagine.’” And again, there was one juror who, by my lights, expressed the basic idea perfectly: Asked whether the victim was “‘innocent or helpless,’” the juror said, “‘Helpless yes, but not innocent.’”

Three closing notes are in order. First, as I’ve already suggested, I think that the ordering concepts Sundby uses—both worthiness and empathy—are not the right concepts, and do justice neither to the normative considerations at work nor to the data he uncovers. None of the jurors quoted in the paper and not much of the data Sundby offers speak to the concept of “worth” in either the ordinary sense of “social worth” (e.g., whether a person is professionally successful,
contributing to society, etc.) or in some more ultimate, metaphysical sense of “human worth.” The focus in the jurors’ remarks and in their tallied responses to the questionnaires had to do with vulnerability, situation-specific innocence, general innocence, and situation-specific and general culpability or responsibility. Furthermore, as discussed above, 219 although empathy may well be a motivating factor at work in capital jurors’ psychology when they respond to victims’ innocence, vulnerability, or culpability, it is neither as specific as those concepts, nor as normatively weighty, nor, in fact, as true to the data. Sundby shows that the jurors tended to identify with innocent or vulnerable victims, it is true. But he does not show that, say, male jurors identified more with male victims, females with female victims, older jurors with older victims, and so on, as a solely empathic view of the situation would predict. What he really demonstrates is the extraordinarily severe and passionate condemnation spurred by crimes committed against vulnerable or innocent victims. And what he misses because he depends on the concepts of “worth” and “empathy” is the extent to which the jurors were evincing a moral position of a certain kind, and not just a sentiment or emotion. In short, Sundby has the data right, the conceptualization of the data wrong.

Second, Sundby’s data also vividly shows the extent to which victimization is an unacknowledged and even embarrassed element of moral thought—for when asked about victim characteristics in the abstract, jurors denied or vastly understated the effect that such characteristics would have on their decisions. Over 90% denied that it would make any difference, in the abstract, whether the victim was a drug addict or a stranger in the community. 220 Almost 90% denied that it would matter whether the victim was a woman or a respected member of the community. 221 Indeed, one doesn’t start to see significant deviations from that pattern of denial—false denial—until jurors are asked whether a victim who is a “known troublemaker” would affect their decision, at which point 28% of jurors admit that they would be less likely to give a death verdict in such a case. 222 And when asked whether a child victim would affect their judgment, 77% of jurors state that they would then be more likely to give a death verdict (with 53% saying “much more likely”). 223 These admissions concerning troublemakers and children demonstrate, of course, a victimization pattern. But as for the rest, one is reminded of a remark by the twentieth century’s subtlest moral philosopher, Bernard Williams: “[W]e do not have to think that what is principally wrong with our ethical life and our understanding of it is that they are insufficiently rational: they may be, for instance, insufficiently honest.” 224

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219 See supra pp. 15.
220 Id. at 377, tbl. 1.
221 Id.
222 Id.
223 Id.
224 BERNARD WILLIAMS, MAKING SENSE OF HUMANITY AND OTHER PHILOSOPHICAL PAPERS 183 (1995). Sundby’s explanation, it should be noted, is that the jurors are not so much self-
Third, although Sundby’s study is the literature’s most direct evidence of the victimization hypothesis in the capital jury context, there are other supportive studies. Whether the victim was a child proves to be consistently important.\textsuperscript{225} Victims’ race matters—and indeed, to many researchers’ surprise, matters more than offenders’ race.\textsuperscript{226} And victims’ gender matters enormously. Glaeser and Sacerdote demonstrate profound gender effects in homicide sentencing generally, with female victims consistently leading to much longer sentences, provided, tellingly, that the female victim was not a prostitute; indeed, these gender effects hold steady even where the male victims in the comparison set were not aggressive and did not initiate conflict, and, indeed, even where (as in vehicular homicides) the victim was selected at random.\textsuperscript{227} Glaeser and Sacerdote also show powerful effects from victims’ criminal histories and race, and they show that “it is always true that when the victim ‘provoked’ the attack, the sentences are much shorter.”\textsuperscript{228} In short, whether in the capital jury context or in other contexts, criminal sentencing for homicide takes place in a bipolar moral world.

III. THE CONCEPT CRITIQUE

The analysis thus far hasn’t been proposing the concept of victimization in a normative sense so much as bearing witness to it. Victimization is a feature of the moral and legal cultures we live within, not a proposal in the way a flat tax or universal health care is a proposal, and we couldn’t even begin to find our feet on the concept normatively without first making the effort to see it clearly. But that deceived as affected differently by, on the one hand, the abstract prospect of an identical crime happening to two different kinds of victims, and, on the other, real-life fact patterns in which the identical crime does not happen to both kinds of victims: “[A]s it turns out, those victim attributes that correlate with a life sentence—drug use, alcohol abuse, unstable personality—tend to manifest themselves in the cases through evidence that can be termed ‘high-risk’ or ‘antisocial.’ . . . . The victim, for example, may have been shooting up drugs with the defendant . . . . By contrast, victims perceived by jurors as possessing more ‘worthy’ attributes are found in fact patterns in which the victim was an ‘innocent’ minding her own business, a fact pattern that, as we will see, correlates strongly with a sentence of death.” Sundby, supra note 187, at 354-55. This too of course supports the victimization hypothesis.

\textsuperscript{225} See, e.g., Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1556 tbl. 3 (1998). Garvey’s evidence for this point is based on a relatively weak source: jurors’ answers to questions in interviews, as opposed to their verdicts. But it is also an interesting source, since, as in Sundby’s research, Garvey shows that childhood seems to be the one victim-based predilection that jurors will admit to: A little over 60% of jurors acknowledge that a child victim would make them more likely to vote for death, and otherwise generally deny that victim characteristics would affect their verdict.


\textsuperscript{227} Edward L. Glaeser & Bruce Sacerdote, Sentencing in Homicide Cases and the Role of Vengeance, 32 J. LEGAL STUD. 363 (2003).

\textsuperscript{228} Id.
done, certain normative questions have been building from the outset. Victimization is a disturbing concept in some ways. It challenges, or perhaps it just falls outside, the paradigm of equality in which we usually think of ourselves as operating. (I suspect that that is why moral and legal theory have missed or avoided the concept in the past.) Yet however disturbing it may be, there victimization is, a reality of the normative order of social life, calling on us to think evaluatively about it not so as to pursue some agenda but just because basic moral features of social life are not the sort of thing to which we can be indifferent. So let’s take up the normative questions now. The concept of victimization is part of what we do; how should we respond to it?

We need to make a distinction here at the outset between two modes of objecting to the concept of victimization. One could, on the one hand, object that the concept is generally unsound—that is, one could think that victimization is, as a whole, an objectionable element of moral life or criminal law. Any manifestation or application of the concept would then be objectionable. Or one could, on the other hand, argue that the concept is locally unsound—that is, one could support the concept in general while still thinking it goes wrong in certain contexts. An instructive comparison is the value of loyalty to one’s benefactors: One could object generally to such loyalty (perhaps viewing it as contrary to principles of equality or merit), or one could think this form of loyalty to be generally a virtue, but a virtue that in some cases becomes distorted or exaggerated or otherwise goes wrong. This latter sort of position—a qualified yes to victimization, the view that victimization is generally a moral insight, but one that in certain contexts goes awry—is my position and the one advanced below.

A. Generally Right

The concept of victimization has a strong affirmative case in its favor; before we get to objections, we should start with that.

John Rawls has argued that the process of normative justification—indeed what it means to have normative justification—involves coming to a “reflective equilibrium” between our abstract commitments to principle on the one hand and our intuitive but considered moral judgments on the other, “work[ing] from both ends,” “going back and forth” between the two until they are brought into an accord that we can reflectively endorse.\textsuperscript{229} It is a method that takes seriously our extant moral convictions as well as our abstract moral ideals, and which uses each as a check upon the potential for moral error of the other. What is so striking about the concept of victimization—and here we come to the normative yield of the philosophical description in Part I—is that it satisfies both halves of the Rawlsian equilibrium. The intuitions undergirding the concept of victimization are extraordinarily powerful; to deny them, one would have either to deny that targeting the blind, the elderly, animals, and children for violence and exploitation

\textsuperscript{229} JOHN RAWLS, A THEORY OF JUSTICE 19-20 (1971). The kind of principles Rawls has in mind are, for example, the commitment to the notion of human beings as “free and equal persons,” and the kind of considered judgments are, for example, Lincoln’s statement
really is morally distinctive (which seems so contrary to ordinary moral judgment as to be unsustainable), or to develop an account of that moral distinctiveness with no reference to vulnerability or innocence (which seems so difficult as to be implausible). At the same time, the concept of victimization proved upon examination (in Part I) to be grounded in an other-regarding moral standpoint and in principles of just deserts and beneficence—that is, to be fundamentally morally rational, to be based on foundations that deserve respect. None of this rules out the possibility of opposing one version or conception of victimization as against another, nor the possibility of opposing some manifestation or application of victimization-style thinking. But it does render a general, wholesale opposition to the concept of victimization implausible.

If we accept that victimization is morally sound and relevant to matters of praise and blame, then it should also be clear that the concept has a role to play on at least a retributive view of criminal justice. It is part of what enables us to pick out better and worse forms of a particular crime. There really is a difference between selling drugs to an adult and selling them to a child, or between having sex with a sixteen-year old and having sex with a six-year old, and it is a victory for the concept of victimization that it enables us to make those distinctions. In other words, the concept is playing an essential functional role in allocating punishments according to relative blameworthiness, and that is a necessary operation in at least any retributive system of criminal justice.

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230 Id. at 5, citing H.L.A. HART, THE CONCEPT OF LAW 155-59 (1961) (distinguishing “the concept of justice” from “the various conceptions of justice,” where the latter is some particular specification of what justice requires, while the former designates a more general conceptual category).

231 See Albert Alschuler, The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next, 70 U. CHI. L. REV. 1, 19 (2003) (“Blame, however, remains at the core of the [retributive] criminal process.”); Douglas N. Husak, Already Punished Enough, 18 PHIL. TOPICS 79, 83 (1990) (“A corollary of the ‘just deserts’ theory is the principle of proportionality, according to which the severity of a punishment should be a function of the seriousness of the offense.”); George P. Fletcher, Reflections on Felony-Murder, 12 SW. U. L. REV. 413, 427–28 (1981) (“[I]t is a basic principle of just punishment [that] punishment must be proportional to wrongdoing.”); MOORE, supra note 4, at 33 (“Retributive justice demands that those who deserve punishment get it. To deserve punishment, two things are necessary: one must have done a wrongful act, and one must have done so culpably.”); John Rawls, Two Concepts of Rules, 64 PHIL. REV. 3, 4–5 (1955) (defining retributivism as the view that “[i]t is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing,” where “the severity of the appropriate punishment depends on the depravity of his act”). See also Kenworthey Bilz & Janice Nadler, Law, Psychology, and Morality, in 50 MORAL COGNITION AND DECISION MAKING 101, 102 (D. Medin et al., eds. 2009) (“To the chagrin of some (Holmes, 1897), law trades in morals. . . . Sometimes, the law engages in moral regulation even where it cannot plausibly be aiming to change behaviors, attitudes, or emotions; the law simply expresses moral commitments shared (often very controversially) by the polity at large.”).

232 As remarked above, supra notes 40-41 and accompanying text, I do not think victimization need be relevant only on a retributive view of criminal justice. Someone interested in deterrence, for example, would also have good reason to think punishments should be stiffened for vulnerable victims.
This affirmative case in place, there is also a profound and sweeping objection to the concept of victimization, which must be answered if we are to say that the concept deserves a qualified yes with exceptions rather than the opposite—a qualified no with exceptions. This is the argument that the concept of victimization violates our political commitment to the equality of persons and our constitutional commitment to the equal protection of the law. Justice Powell gave voice to this objection in the controversy over victim impact statements: “We are troubled by the implication that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Of course, our system of justice does not tolerate such distinctions.”

It is indeed difficult to see how one could punish the same crime differently based on characteristics of victims without thereby implying that some people are more valuable than others. And that implication does seem incompatible with equality. Surely this is why the concept of victimization is an embarrassed moral value, at work in our intuitions and our law but reluctant to show its face.

The incompatibility, however, is not as deep as it might appear. For one thing, the concern for equality in criminal punishment, as Justice Powell’s remark indicates, has to do with the specter of the wealthy victim, or the well-connected victim, or the white victim, or some other such member of a favored class or caste getting better treatment on account of his or her status. But victimization is not about caste systems or social status or wealth. It is in many ways just the opposite: Victimization is about the helpless, the vulnerable, the innocent—children, the handicapped, animals. That is to say, the concern for equality seems misplaced in the victimization context. In a strictly formal, abstract sense the objection might seem to have some force. But in a practical sense, in terms of the kind of things we ordinarily invoke the principle of equality for, the objection hardly bites at all.

Even in a formal, abstract sense, the tension between victimization and equality can be substantially allayed. To punish two people who committed the same crime differently on account of some characteristic of their victims is not necessarily to value one of the victims over the other. Consider two homicides: In one, the offender kills, intending to kill, for money, and the victim is a stranger; perhaps the offender wants his wallet. In the other, the offender kills, intending to kill, for money, and the victim is his mother; perhaps the offender wants his inheritance. (Assume, by the way, that the mother has done nothing against the child who kills her—or if that is difficult to imagine, turn it around and picture the offender as the mother and the victim as her son.) We can easily see the latter case as more blameworthy than the former without thereby seeing the latter death as more important than the former. From a third party standpoint, the two lives

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234 See supra notes 217, 220-224 and accompanying text.
lost are of equal value. But because of a feature of the relationship between parent and child, the latter crime tells us something significant about the wrongdoer that the former crime doesn’t; it tells us that the wrongdoer has abandoned any commitment to a value we hold dear, namely, love and loyalty within families. Thus the blameworthiness of the wrongdoer shifts with no change in the value of the two victims. The example is architecturally identical to the victimization issue. The essential thought with victimization is that we are put into moral relationships with others in ways that are shaped by the particular characteristics of those others, and that how we behave in light of those relationships signals our commitment to values like justice and beneficence.  

Two offenders can stand differently with regard to justice and beneficence because one stole from a blind person and the other from a sighted person, without thereby valuing the two victims at different worths.

I don’t pretend that every tension between equality and victimization is thus resolved. There are further questions. For example, we tend on victimization-style thinking to view it as worse—not just more blameworthy, but worse as a state of affairs—when a child has been raped than when an adult has been raped. Indeed, even where there is no blameworthiness at all, we still tend to apply a victimization logic: Many people are less saddened to hear that an office building collapsed in an earthquake, killing dozens, than that a school collapsed in an earthquake, killing the same number. It may be that, in pursuit of Rawls’s reflective equilibrium, the concept of victimization has to be cut short, cabined by the competing principle of equality in such cases. For my part, I believe at a minimum that the principle must be cabined in cases, such as accidents, in which blameworthiness is not at issue, where the victim’s status as vulnerable or innocent or the opposite is a matter of moral luck. I also think, however, that enough has been said to show that our commitment to equality should not lead us to reject the concept of victimization wholesale. And I would also suggest that a dogmatic position—for equality and against victimization or the opposite—is not appropriate in this context. We see here two principles at work in our moral and legal cultures. The two principles are in some degree of tension. That is one of the consequences of value pluralism, something we see also in conflicts between familiar and important values like liberty and equality, and the appropriate response to the tension is careful thought and local judgments about priority, not wholesale rejection of one value or the other.

B. Locally Wrong

The picture is darker when we examine the ways in which the concept of victimization is manifested and applied. Not that there aren’t victories for the

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235 See supra Part I.B, I.C.

236 See generally BERNARD WILLIAMS, MORAL LUCK (1982). Note that this is a limited group of cases as a matter of criminal law. In the main, criminal law is interested in blameworthy wrongdoing.

237 See generally ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969).
concept here too. The nuance of the body of law regulating statutory and child rape, for example, the precision with which it traces out the concept of victimization, is a victory for the concept and the law. Yet much as it is generally sound, the victimization concept shows some highly disturbing local applications. I would like to highlight two instances of the concept misfiring, of victimization gone awry—instances that are, I think, illustrative of the ways in which victimization typically goes wrong and typically can be made right. Foremost is a cluster of issues connected to gender. Second is the issue of prison rape.

The connection between victimization and gender is both disturbing and complex. There are first of all some troubling empirical patterns in this area. On the one side, criminal law shows a pattern of treating crimes as less blameworthy where a female victim is sexually or romantically involved with the offender, as in date rape, prostitution, or traditionally domestic violence. On the other side, where the female victim is not sexually or romantically linked to the offender, criminal law shows a pattern of treating the crimes as more blameworthy, and indeed, substantially more blameworthy, than the same crimes committed against men: The empirical evidence indicates that a victim’s gender alone, even in cases of wrongful accidents, powerfully predicts the length of criminal sentences, and in capital cases, correlates to the likelihood of a death sentence. It seems clear enough that victimization thinking is at least one of the culprits here. America has a history of regarding women as either fallen or not fallen, and where not fallen, as highly vulnerable and innocent. This is essentially an infantilizing tradition. Victimization is being enlisted here in the service of gender stereotypes.

Victimization in this context goes wrong in four distinct ways. First, where crimes committed against female victims are punished more harshly than otherwise identical crimes committed against men, the gender stereotype is functioning as a proxy for vulnerability and innocence. But gender is a lousy proxy for those characteristics; the stereotype, offensive in itself, simply does not correlate well enough to real vulnerability or innocence to avoid being arbitrary. Second, in many of the situations involving female victims with a romantic or sexual connection to the offender—date rape or domestic violence, for example (at least in jurisdictions that continue to give those crimes lax treatment)—the law appears to be making morally blinkered judgments of culpability and responsibility. A woman who goes on a date cannot be thought to have assumed the risk or knowingly undertaken the risk of coercive sex, nor to have done something culpable that might make coercive sex even a little bit deserved. There is properly no analogy between going on a date and, say, knowingly taking a

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238 See supra Part II.A.2.
239 See supra p. 10-11 and notes 148, 158-160, 227 and accompanying text.
240 See supra notes 168-184, 202, 217, 227 and accompanying text.
241 See McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (“It would violate the Equal Protection Clause for a State to base enforcement of its criminal laws on an unjustifiable standard such as race, religion, or other arbitrary classification.”).
shortcut through a bad neighborhood—but the law at times acts as though there were. Third, even where the female victim did undertake a risk or do something illegal herself, as in the case of prostitution, the law’s leniency toward offenders is so marked as to treat the rights violation as if it were minor. But victimization does not authorize treating serious crime as though insignificant wherever it befalls those with unclean hands. The concept merely approves comparative judgments of urgency and seriousness where the same crime befalls those with and without clean hands. And finally, fourth, again with regard to cases like prostitution in which the victim displays some measure of responsibility or culpability, there is a risk of attending so intently to the innocence prong of the victimization concept that the vulnerability prong is altogether neglected. Many prostitutes are, if unusually culpable or responsible, also unusually vulnerable. That tug on the vulnerability part of the concept, even if there is a tug in the other direction as to innocence, should at least complicate our moral judgments in these contexts.

There are some general lessons to draw from this example, but let’s first touch on the second instance of victimization gone awry: the situation of mass prison rape in the United States. There is reason to think the victimization concept is at work in the indifference often displayed to prison rape, a conceptual tool people use to cut themselves off morally from what is in fact a serious human rights violation; the rape of convicted criminals is not that important an issue, the thinking goes, because, after all, it is “only” criminals being raped. And it is true that the concept of victimization implies, as a purely comparative matter, that it is better for a deeply morally stained criminal to be raped than, say, for a child, or just an everyday citizen, to be raped; this is a consequence of the desert-based roots of the innocence prong of the victimization concept. But three points. First, one can accept the implication that the rape of a prisoner guilty of some serious crime is not as bad as the equivalent rape of a child or ordinary citizen without for a moment thinking that prison rape is not terrible, and on a mass scale, an injustice of the sort that tars a nation. To act as though a claim has no value, rather than merely reduced relative value, because it comes from someone who is culpable is an error of exaggeration, architecturally identical to the error we saw with the law’s treatment of prostitutes. Second (and again in parallel to the prostitution example), by exaggerating one prong of the victimization concept, we overlook the other, for if prisoners are less innocent than the average citizen, they are also, as prisoners, more vulnerable—and more vulnerable on account of something we did to them, namely, lock them up. If their lack of innocence points in one direction, their vulnerability, on our account, points in the other. Third, as touched upon above, one can revise the concept of victimization in cases like this without abandoning it, cabining the application of the concept to cases in which there is a direct causal link between the victim’s wrong and the wrong visited upon him—to the bank robber shot by an accomplice for a share of

\[242\] See supra note 32 and accompanying text.

\[243\] See supra note 69 and accompanying text.
the loot but not to Bernie Madoff being randomly mugged on his way home from work.

Yet although these examples give reason to be critical of victimization thinking, we should not take them as reason to be unrelentingly critical, to be merely hostile. For once we become aware that victimization thinking is at work in our practices, we can begin to challenge those practices, and indeed the concept of victimization itself provides resources for the challenge; it becomes a critical tool. Once we see that female victims are treated differently on account of gender stereotypes, for example, we can start asking pointed questions about whether gender really is an adequate proxy for otherwise valid moral concerns over vulnerability and innocence. We can start asking whether someone having gone to prison for, say, stealing cars really is justification for his being raped. It is not that victimization thinking always goes right, but the concept is sound enough that, for the most part, it can be set right from the inside. And certainly becoming aware of the ways in which victimization thinking operates within our practices is useful to the enterprise of setting those practices right. Self-awareness serves justice.

CONCLUSION: CRIMINAL LAW’S IMMANENT MORAL CONTENT

The doctrine and practice of criminal law reflect a moral outlook in which judgments of wrong and blame are based in part on the vulnerability or innocence of victims—or so this paper has aimed to show. Implicit in that thesis is a certain model of the relationship between philosophy and law. I would like to close with a remark about that model.

The central methodological idea behind this paper is that our existing social practices imply or reflect certain normative commitments—that various beliefs and values are immanent in our social arrangements—and that one important philosophical project in the law is to bring those immanent normative commitments to light. The idea is also that, by bringing those immanent commitments to light, we expose them to a distinctive form of critique. We effectively look in the mirror and ask, “Do I like what I see? Are these commitments ones I can reflectively endorse? And if so, am I living up to them? Am I realizing them in the right way?” This is social critique from the inside, as it were, and there is an intellectual tradition associated with it: the tradition of reconstructive social thought.²⁴⁴

This paper has been an entry in the reconstructive project. The concept of victimization is embedded in criminal law already, I’ve argued; the object of this paper has been first to see that clearly, and then to question what we see. At times, philosophy can seem like an alien visitor in law, touching down to deliver pronouncements and then flying off again. But here the law is not just an instrument with which to implement the conclusions of an extralegal philosophical inquiry, nor merely the site from which to launch such an inquiry, but an object of study with a certain moral content already in place, which philosophy can help bring to light and expose to question. Indeed, it is not as though the concept of victimization has long been known to moral philosophy and only just discovered in criminal law. The opposite is the case. Law was philosophy’s teacher here.